

9-28-2011

# Keybank Nat'l Ass'n v. Pal I, LLC Augmentation Record Dckt. 38645

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In the Supreme Court of the State of Idaho

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff-Respondent,

v.

PAL I, III, an Idaho limited liability company,

Defendant-Appellant,

and

BRIAN CHRISTENSEN, an individual; L.A.  
PARKINSON, an individual; BARNEY  
DAIRY, INC.; D.J. BARNEY, an individual;  
WILLIAM DAVIS, an individual; LOIS  
DAVIS, an individual; DELL RAY BARNEY,  
an individual; and DELL J. BARNEY, an  
individual, dba BARNEY TOWING &  
RECOVERY,

Defendants.

ORDER GRANTING MOTION TO  
AUGMENT THE CLERK'S RECORD

Supreme Court Docket No. 38645-2011  
Madison County Docket No. 2010-680

A MOTION TO AUGMENT THE CLERK'S RECORD and a STATEMENT OF  
COUNSEL were filed by counsel for Appellant on September 26, 2011. Therefore, good cause  
appearing,

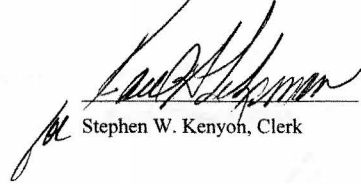
IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT THE CLERK'S  
RECORD be, and hereby is, GRANTED and the augmentation record shall include the document  
listed below, file stamped copies of which accompanied this Motion:

1. Memorandum decision on Post-Judgment Motions, file-stamped August 31, 2011.

ORDER GRANTING MOTION TO AUGMENT THE CLERK'S RECORD – Docket No.  
38645-2011

DATED this 28<sup>th</sup> day of September, 2011.

For the Supreme Court

  
Stephen W. Kenyon, Clerk

cc: Counsel of Record

LAW CLERK

AUGMENTATION RECORD

ORDER GRANTING MOTION TO AUGMENT THE CLERK'S RECORD – Docket No.  
38645-2011

# In the Supreme Court of the State of Idaho

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff-Respondent,

v.

PAL I, III, an Idaho limited liability company,

Defendant-Appellant,

and

BRIAN CHRISTENSEN, an individual; L.A.  
PARKINSON, an individual; BARNEY  
DAIRY, INC.; D.J. BARNEY, an individual;  
WILLIAM DAVIS, an individual; LOIS  
DAVIS, an individual; DELL RAY BARNEY,  
an individual; and DELL J. BARNEY, an  
individual, dba BARNEY TOWING &  
RECOVERY,

Defendants.

ORDER GRANTING MOTION TO  
AUGMENT THE CLERK'S RECORD

Supreme Court Docket No. 38645-2011  
Madison County Docket No. 2010-680

KEYBANK NATIONAL ASSOCIATION'S MOTION TO AUGMENT THE CLERK'S RECORD was filed by counsel for Respondent on March 1, 2012. Therefore, good cause appearing, IT HEREBY IS ORDERED that KEYBANK NATIONAL ASSOCIATION'S MOTION TO AUGMENT THE CLERK'S RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

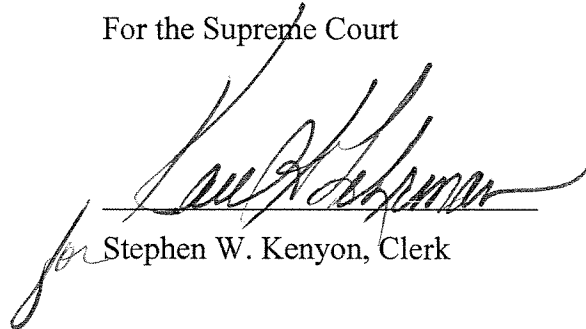
1. Motion Contesting PAL I, LLC's Claim of Exemption, with attachments, file-stamped June 20, 2011;
2. Memorandum in Support of Motion Contesting PAL I, LLC's Claim of Exemption, file-stamped June 20, 2011;
3. Affidavit of Alexander P. McLaughlin in Support of Motion Contesting PAL I, LLC's Claim of Exemption, with attachments, file-stamped June 20, 2011;

ORDER GRANTING MOTION TO AUGMENT THE CLERK'S RECORD – Docket No.  
38645-2011

4. Affidavit of Alexander P. McLaughlin in Support of Plaintiff's Second Motion Contesting PAL I, LLC's Claim of Exemption, with attachments, file-stamped December 14, 2011;
5. Memorandum in Support of Motion to Reconsider Order Staying Execution, file-stamped December 16, 2011; and
6. Affidavit of Alexander P. McLaughlin in Support of Motion to Reconsider Order Staying Execution, file-stamped December 16, 2011.

DATED this 5<sup>th</sup> day of March, 2012.

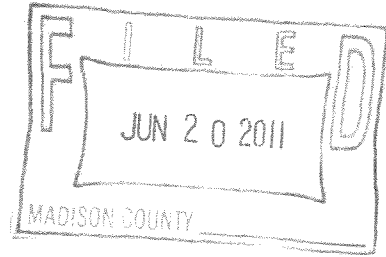
For the Supreme Court

  
for Stephen W. Kenyon, Clerk

cc: Counsel of Record

COPY RECEIVED  
JUN 21 2011

Givens Pursley, LLP



Thomas E. Dvorak (ID State Bar ID# 5043)  
Alexander P. McLaughlin (ID State Bar ID# 7977)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
1109468\_2 [10894-2]

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

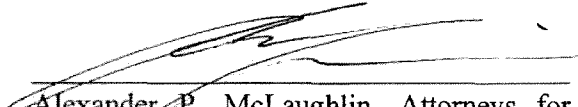
MOTION CONTESTING PAL I,  
LLC'S CLAIM OF EXEMPTION

COMES NOW Plaintiff KeyBank National Association ("KeyBank" or "Plaintiff"), by and through its counsel of record, Givens Pursley LLP, and hereby moves this Court pursuant to I.C. § 11-203 for an order denying the Claim of Exemption filed by Pal I, LLC ("Pal") on or about June 13, 2011. This motion is made on the grounds and for the reasons that the bases delineated in Pal's Claim of Exemption lack merit and for the additional reason that our Idaho Supreme Court specifically permits the particular levy and execution sought by KeyBank in this matter. Further grounds are contained in KeyBank's Memorandum in Support of Motion Contesting Pal I, LLC's Claim of Exemption, which is incorporated herein by this reference. This motion is based on the records, pleadings, and files lodged and/or filed herein and any other such items which may hereafter be lodged and/or filed herein, the Affidavit of Alexander P. McLaughlin in Support of Motion Contesting Pal I, LLC's Claim of Exemption, and the memorandum referred to above. A true and correct copy of the Claim of Exemption is attached to the foregoing affidavit and this motion and is hereby lodged with the Court.

Oral argument is requested on this motion.

DATED this 16<sup>th</sup> day of June, 2011.

GIVENS PURSLEY LLP

  
Alexander P. McLaughlin, Attorneys for  
KeyBank National Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of June, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES,  
PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

☒ Via U.S. Mail  
☐ Via Hand-Delivery  
☐ Via Overnight Delivery  
☒ Via Facsimile 208-529-4166

  
Alexander P. McLaughlin

Bryan D. Smith, Esq. – ISBN 4411  
 B. J. Driscoll, Esq. – ISBN 7010  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
 414 Shoup Ave.  
 P.O. Box 50731  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 524-0731  
 Facsimile: (208) 529-4166

Attorneys for Defendant/Appellant  
 PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
 national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;  
 BRIAN CHRISTENSEN, an individual; L.A.  
 PARKINSON, an individual; BARNEY DAIRY,  
 INC.; D.J. BARNEY, an individual; WILLIAM  
 DAVIS, an individual; LOIS DAVIS, an  
 Individual; DELL RAY BARNEY, an individual;  
 and DELL J. BARNEY, an Individual, dba  
 Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

**CLAIM OF EXEMPTION**

1. I claim an exemption from levy for the following described money and/or property:

- a) Money, including money in a bank account, which was paid to me or my family as:
  - \_\_\_\_\_ Public assistance of any kind
  - \_\_\_\_\_ Social Security or SSI
  - \_\_\_\_\_ Worker's compensation
  - \_\_\_\_\_ Unemployment benefits
  - \_\_\_\_\_ Child Support
  - \_\_\_\_\_ Retirement, pension, or profit sharing benefits
  - \_\_\_\_\_ Military or veteran's benefits
  - \_\_\_\_\_ Life insurance or other insurance
  - \_\_\_\_\_ Disability, illness, medical or hospital benefits
  - \_\_\_\_\_ Alimony, support or maintenance
  - \_\_\_\_\_ Annuity contract benefits
  - \_\_\_\_\_ Bodily injury or wrongful death awards

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 CLERK OF DISTRICT COURT  
 SEVENTH JUDICIAL DISTRICT  
 IDAHO



Other money (describe) \_\_\_\_\_

Wages (Do not check this box until you have first talked to your employer to see if he/she correctly calculated your exemption according to the formula under Item 28 on the form entitled "SOME EXEMPTIONS TO WHICH YOU MAY BE ENTITLED." Then check this box only if you believe your employer's calculation is incorrect.

b) Property,

Professional books

Burial plots

Health aids

Homestead, house, mobile home and related structures

Jewelry

Car, truck or motorcycle

Tools and implements

Appliances, furnishings, firearms, animals, musical instruments, books, clothes, family portraits and helrooms

Other property (describe) Defendant PAL I, LLC ("PAL") objects to the Plaintiff's purported execution by levy and attachment on the grounds that the exact property that the Plaintiff has attempted to levy upon is unclear from its writ and notice. Further, PAL claims that "all debts and credits owing to [it] . . . including but not limited to [its] claim, cause of action and appeal in this matter" purportedly levied upon by the Bonneville County Sheriff are exempt from levy by execution on the following grounds: (1) PAL's right to appeal the judgment entered in this case in favor of Plaintiff is not subject to execution to satisfy that same judgment from which PAL appeals; (2) Plaintiff's execution has violated Idaho Code Sections 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301; and (3) Plaintiff violated Idaho Rule of Civil Procedure 5.

B. J. Driscoll  
B. J. Driscoll, Esq.

Attorney for Defendant, PAL I, LLC

P.O. Box 50731

Address

Idaho Falls, ID 83405

City, State Zip

208-524-0731

Phone Number

Return to: Bonneville Sheriff, 605 N. Capital Ave., Idaho Falls, ID 83402



Forest  
Service

Washington  
Office

1400 Independence Avenue, SW  
Washington, DC 20250

File Code: 5510  
Route To: (2700)

Date: February 5, 2010

Subject: Revised Statute 2477 Valley County

To: Harv Forsgren, Regional Forester, R-4

This responds to your September 25, 2009, letter, requesting the Chief's approval to accept Valley County's Revised Statute (RS) 2477 right-of-way title claim submitted to the Payette National Forest on April 15, 2009. In its letter to the Forest, the County requests that the Forest Service make a non-binding administrative determination validating the county's claim that the Smith Creek Road is a public highway under R.S. 2477. The County provided historical evidence in support of its assertion of a right-of-way along Smith Creek Road.

Forest Service policy pertaining to R.S. 2477 claims, FSM 2734.51 "Policies and Administration for Rights-of-Way Granted by Revised Statute 2477," references a Department of the Interior (DOI) process for conducting non-binding administrative determinations of R.S. 2477. DOI withdrew this policy in 2006 and no longer operates according to the process set forth in it for conducting non-binding determinations. Because the DOI process for conducting non-binding administrative determinations referenced in FSM 2734.51 is no longer operable, we recommend that regions discontinue non-binding administrative determinations of R.S. 2477 claims pending amendment of FSM 2730, which is in process. Existing agency directives do not require Chief's office review and approval for non-binding administrative determinations of R.S. 2477 claims.

In addition, please note that the September 25, 1997, letter from the Washington Office to the regions cited in your letter does not constitute agency policy because it is not part of the agency's directives system. Therefore, its provisions do not govern the process for conducting administrative determinations.

In response to the U.S. Court of Appeals for the Tenth Circuit's decisions in *Southern Utah Wilderness Alliance v. Bureau of Land Management* and *Southern Utah Wilderness Alliance v. Kane County* affirming that the Quiet Title Act is the sole means to establish a legally valid R.S. 2477 right-of-way claim, and in light of changes to DOI R.S. 2477 procedures, we are amending agency directives applicable to R.S. 2477. We will be coordinating with BLM during this amendment process in determining whether to provide for a non-binding administrative determination process as part of the amended directives.



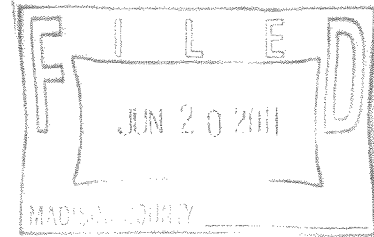
America's Working Forests -- Caring Every Day in Every Way

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1109468\_2 [10894-2]

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
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BARNEY DAIRY, INC.; D.J. BARNEY, an  
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LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

MEMORANDUM IN SUPPORT OF  
MOTION CONTESTING PAL I, LLC'S  
CLAIM OF EXEMPTION

COMES NOW Plaintiff KeyBank National Association (“KeyBank” or “Plaintiff”), by and through its counsel of record, Givens Pursley LLP, and hereby submits this Memorandum in Support of Motion Contesting Pal I, LLC’s Claim of Exemption.

## **I. INTRODUCTION**

This memorandum provides the legal and factual argument in support of Plaintiff’s Motion contesting to the claim of exemption filed by Pal I, LLC (“Pal”) on or about June 13, 2011 (“Claim of Exemption”) and is filed in accordance with Idaho Code Section 11-203. A copy of the Claim of Exemption is attached to the Affidavit of Alexander P. McLaughlin in Support of Motion Contesting Pal I, LLC’s Claim of Exemption as Exhibit A, filed contemporaneously herewith and thereby lodged with the Court in accordance with Idaho Code Section 11-203(b).

In its Claim of Exemption, Pal argues that: its right to appeal the underlying judgment of the Court is not subject to levy and execution, the subject of execution is “unclear,” KeyBank has violated numerous provisions under Title 8 and 11, and that KeyBank is in violation of Rule 5 of the IDAHO RULES OF CIVIL PROCEDURE (“IRCP”). The only position, however, that is actually supported by any substantive argument is that KeyBank may not levy on an appeal and/or right to appeal when the judgment that is the subject of the levy is also the basis of the appeal.<sup>1</sup> Pal’s arguments lack merit and its Claim of Exemption should be denied on the following grounds:

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<sup>1</sup> Keybank also disagrees with these conclusory arguments/statements by Pal which on their face are clearly inaccurate.

- The relief sought by KeyBank is permissible under Idaho law addressing levy and execution and out of state authorities addressing the same; and
- The relief sought by KeyBank has been granted by the Idaho Supreme Court in an analogous case.

In light of the foregoing, KeyBank respectfully requests that this Court DENY the Claim of Exemption and permit levy and execution in the manner specified by KeyBank. KeyBank also requests that the Court award additional attorney's fees and costs pursuant to I.C. § 12-120(5).

## **II. STATEMENT OF PROCEDURAL HISTORY**

On January 3, 2011, this Court issued a judgment against Pal in the amount of \$16,884.41, accruing interest at the statutory rate ("Judgment"). Judgment, P. 2. Thereafter, on March 16, 2011, Pal filed a notice of appeal. Counsel for Keybank contacted counsel for Pal and inquired as to whether Pal intended to post a supersedeas bond in accordance with Rule 13(b) of the IDAHO APPELLATE RULES ("IAR").

On March 23, 2011, B.J. Driscoll responded to that inquiry by e-mail as follows: "I spoke to my client today. We will not be posting any surety bond or security to stay execution at this time." *See* Affidavit of Alexander P. McLaughlin in Support of Motion Contesting Pal I, LLC's Claim of Exemption, Ex. B.

Thereafter, KeyBank sought and obtained a writ of execution. On May 19, 2011, the foregoing writ was sent to the Bonneville County Sheriff along with instructions which read, in relevant part:

Please attach and levy upon all goods, chattels, moneys and other property, both real and personal, or any interest therein of Judgment Debtor, not exempt by law, in pursuance of the writ, **and further attach and levy upon the debts and credits and other personal property not capable of manual delivery, specifically including but not limited to Defendant PAL I, LLC's claim, cause of action, and appeal rights associated with this matter, Madison County District Court Case No. CV-2010-680, Idaho Supreme Court/Court of Appeals Docket No. 38645**

*Id.*, Ex. C.

On June 13, 2011, this office received a Claim of Exemption from Pal. The Claim of Exemption argues that KeyBank may not levy on Pal's appeal to satisfy the Judgment. Keybank moves this Court for an order denying the Claim of Exemption and now submits this memorandum in support of the foregoing request.

### **III. ARGUMENT**

KeyBank's position is two-fold:

- 1.) Pal's Claim of Exemption should be denied because the levy and execution sought by KeyBank is expressly permitted under Idaho statutory authority and case law in other jurisdictions.
- 2.) Pal's Claim of Exemption should be denied because the relief sought by KeyBank has been granted by the Idaho Supreme Court in an analogous case.

### **IV. ANALYSIS**

- 1.) Pal's Claim of Exemption should be denied because the levy and execution sought by KeyBank is expressly permitted under Idaho statutory authority and case law in other jurisdictions.

The issue at bar is whether an underlying cause of action/right to appeal may be levied upon to satisfy a money judgment. I.C. § 11-301 is the operative provision. I.C. § 11-301 specifically permits the foregoing relief:

The sheriff must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property if there be sufficient; **collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment.**

I.C. § 11-301 (emphasis added); *See also Hill v. Joseph*, 58 Idaho 267, 72 P.2d 283, 284 (1937) (citing to I.C.A. § 8-301, the precursor to I.C. § 11-301 (Sess. Laws 1991, ch. 165, § 12, p. 395)) (“The sheriff must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property if there be sufficient; **collecting or selling things in action ...**”) (emphasis added).<sup>2</sup>

In addition to its codification, Idaho has long treated choses in action as property by way of judicial interpretation. *See Taylor v. Maile*, 146 Idaho 705, 710, 201 P.3d 1282, 1287 (2009) (“[U]nder Idaho law, a chose in action **is an asset**”) (citations omitted) (emphasis added); *See also Muir v. City of Pocatello*, 36 Idaho 532, 212 P. 345, 347 (“A right to sue for an injury is a right of action-**it is a thing in action, and is property**”) (citations omitted) (emphasis added); *See also Purco Fleet Services, Inc., v. Idaho State Department of Finance*, 140 Idaho 121, 126, 90 P.3d 346, 351 (2004) (“Idaho recognizes that choses in action **are generally assignable**”) (citations omitted) (emphasis added).

Other jurisdictions have also reached the conclusion that it is permissible to levy on a cause of action, even if the judgment being satisfied emanates from the cause of action being levied upon. *RMA Ventures California v. Sun America Life Insurance Company*, 576 F.3d 1070

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<sup>2</sup> Black’s Law Dictionary defines a thing in action as a “right to recover money or other personal property by a judicial proceeding.” *See* Black’s Law Dictionary, ed. 6<sup>th</sup>, P. 1479; *See also Id.* at P. 241 (Defining a “chose in action” as also being a “thing in action; a right of bringing an action or right to recover a debt or money. Right of proceeding in a court of law to procure payment of [a] sum of money”).

(10<sup>th</sup> Cir. 2009), *Citizens National Bank v. Dixieland Forest Products, LLC*, 935 So.2d 1004 (Miss., 2006), and *Arbie Mineral Feed Co. Inc., Farm Bureau Mutual Insurance Company*, 462 N.W.2d 677 (Iowa, 1990) are directly on point. *RMA Ventures, supra*, is particularly instructive.

In *RMA Ventures*, RMA Ventures California (“RMA Ventures”) brought suit against Sun America Life Insurance (“Sun America”), alleging breach of contract and misrepresentation. *RMA Ventures*, 576 P.3d at 1072. Thereafter, Sun America filed a motion for summary judgment, seeking to dismiss the claims asserted by RMA Ventures. The motion was granted and Sun America submitted a request for fees and costs. The Court awarded fees and costs and entered judgment therefor in the amount of \$87,563.07. *Id.*

On April 11, 2008, Sun America obtained a writ of execution to procure payment for the foregoing judgment. The Salt Lake City Deputy Constable issued notice that a public execution sale would take place on May 15, 2008. The property noticed was RMA Ventures’ “right to the chose in action (i.e., the legal claims) against Defendants ... including Plaintiff’s right to appeal the district court’s grant of summary judgment.” *Id.* RMA Ventures filed a motion to quash the execution sale. The motion was denied and on May 15, 2008, Sun America purchased RMA Ventures’ right to the lawsuit against Sun America for \$10,000. *Id.* RMA Ventures attempted to continue with the appeal. Sun America objected and argued that RMA Ventures could not continue because RMA Ventures no longer owned its cause of action against Sun America. *Id.* This raised an issue as to the validity of the sheriff’s sale and, more specifically, the permissibility of levying on an opposing parties’ cause of action.



On appeal, the Tenth Circuit Court of Appeals unanimously ruled in favor of Sun America and dismissed RMA Ventures' lawsuit. The Court's reasoning was straightforward – because the Legislature permits a sheriff to levy on causes of action, once Sun America purchased RMA Ventures' claim, Sun America was the sole owner thereof. Being its sole owner, Sun America acted perfectly within its prerogative in dismissing the claim against itself.

According to the Court:

Pursuant to Utah law, Defendants attempted to satisfy their money judgment by purchasing Plaintiff's legal right to pursue this action. **We have found no Utah authority, and Plaintiff cites none, precluding the execution sale of Plaintiff's chose in action against Defendants. In fact, the Utah Supreme Court has expressly held that a defendant can purchase claims, i.e., choses in action, pending against itself and then move to dismiss those claims.** Thus, at least on the surface of Defendants' actions, we find no problem in law or fact to negate Defendants' contention that they obtained the rights to this cause of action, thereby depriving Plaintiff of standing.

*Id.* at 1075 (citations omitted) (emphasis added).

\*\*\*

**[W]e are unable to ignore the fact that a public execution sale took place in which Defendants purchased Plaintiff's legal right to continue this appeal for \$10,000.** See *GP Credit Co., LLC v. Orlando Residence, Ltd.*, 349 F.3d 976, 980 (7<sup>th</sup> Cir. 2003) (noting that a chose in action is an intangible form of property that can be sold at a foreclosure sale, whereby the purchaser steps into the shoes of the prior owner and becomes the claimant in the suit); *Citizens National Bank v. Dixieland Forest Products, LLC*, 935 So.2d 1004 (Miss., 2006) (holding that the defendant—who was also the plaintiff's judgment creditor after prevailing on a counterclaim—could purchase the plaintiff's pending claims at a public execution sale, thereby becoming the real party in interest); *Applied Medical Techs.*, 44 P.3d at 702-03 (recognizing that “causes of action are regularly sold” and “the sale cuts off the former plaintiff's right to pursue those claims.”)

*Id.* at 1075-1076 (emphasis added).

\*\*\*

Accordingly, Defendants are now the true owner's [sic] of Plaintiff's lawsuit and may move to dismiss the claims pending before us on appeal.

*Id.* at 1076 (emphasis added); *See also Applied Medical Technologies v. Eames*, 44 P.3d 699, 701-702 (Utah, 2002) ("Given that choses in action are amenable to execution ... it follows that a defendant can purchase claims, i.e., choses in action, pending against itself and then move to dismiss those claims") (emphasis added).

The rulings in *RMA Ventures* and *Applied Medical* are extremely significant since Utah's corresponding levy and execution provision is very similar to Idaho's. *Compare* Utah R. Civ. P. 69(f) ("**[T]he officer must execute the writ** against the non-exempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property; **collecting or selling the choses in action ...**") (emphasis added) *with* I.C. § 11-310 ("**The sheriff must execute the writ** against the property of the judgment debtor by levying on a sufficient amount of property if there be sufficient; **collecting or selling the things in action**") (emphasis added). Based on the foregoing similarities, KeyBank submits that the reasoning in *RMA Ventures* and *Applied Medical* is entitled to deference by this Court.

In *Citizens National*, the Mississippi Supreme Court also concluded that a chose in action is property and therefore properly the subject of levy. *Citizens National*, 935 So.2d at 1009. Particularly noteworthy is the fact that the decision relied primarily on state statute and case law that mirrors Idaho authorities addressing the same. For example, the Court in *Citizens National* supported its opinion by first concluding that a chose in action is property. *Id.* ("[A chose in action] is property") (citations omitted). In *Taylor, supra*, the Idaho Supreme Court made the

same point. *Taylor*, 146 Idaho at 710, 201 P.3d at 1287 (“[A] chose in action is an asset”) (citations omitted); *See also Muir*, 36 Idaho 532, 212 P. at 347 (“A right to sue for an injury is a right of action – it is a thing in action, and is property”) (citations omitted). Because a chose in action is considered property, the Court in *Citizens National* also stated that it could be “assigned the same as other property.” *Citizens National*, 935 So.2d at 1009. In *Purco Fleet Services, Inc.*, *supra*, the Idaho Supreme Court came to the very same conclusion. *See Purco Fleet Services, Inc.*, 140 Idaho at 126, 90 P.3d at 351 (“[C]hoses in action are generally assignable”) (citations omitted).

Based on the premise that a chose in action is property and is assignable, and further based on the well established principle that it is the Legislature’s role to declare the law of the State, the Court in *Citizens National* concluded as follows:

**[A chose in action] is property ... It is an asset of the judgment debtor, and why should not his assets, whatever their nature, be taken to satisfy a judgment? We cannot see any logical reason why such property should not be levied on ... [A] chose in action is personal property subject to a writ of execution.** The plaintiffs argue a trial is necessary to determine the value of their claims against the bank, and an execution before a trial circumvents their rights ... [T]he relevant statutes do not require ‘valuation by trial.’ The Legislature could have excepted choses in action from execution, but did not, and it is not our role to create such exceptions in an unambiguous statutory scheme. As with any other personal property, a chose in action’s value – for purposes of levy and execution – is determined at a sheriff’s execution sale.

*Citizens National*, 935 So.2d at 1010 (citations omitted) (emphasis added).

*Arbie Mineral*, *supra*, is also directly on point. In that case, the Supreme Court of Iowa unequivocally affirmed that a creditor may levy on a cause of action:

At common law, choses in action could not be reached by execution. Iowa, however, has adopted the broad form of statutory execution authorizing levy on choses in action. A “chose in action” is the same thing as a “thing in action.” A chose (or thing) in action is a right not reduced into possession or a right under a contract which, in case of nonperformance, can only be reduced to beneficial possession by an action or suit. **We have previously stated that the phrase “things in action” includes a claim for breach of contract. Such a claim is a cause of action. A cause of action is in existence prior to judgment and is personal property upon which, under Iowa law, a creditor may levy.**

*See Arbie Mineral*, 462 N.W.2d at 680 (citations omitted) (emphasis added).

Notwithstanding the foregoing, the Court ultimately concluded that while a party may levy on a cause of action, Arbie failed to properly effectuate levy thereon, and therefore failed to create a lien. The Court went on to discuss the scenario that would have occurred had the levy been carried out correctly. The scenario elucidated by the Court is the precise relief sought by KeyBank. Although *dicta*, the Court’s discussion is instructive:

Had Arbie levied upon Elgin’s cause of action, that cause of action could have been sold at sheriff’s sale. Arbie could have purchased the chose in action and had it assigned. It could have then prosecuted the claim against Farm Bureau in Elgin’s place.

*Id.* (citations omitted); *Compare with Purco Fleet Services, Inc.*, 140 Idaho at 126, 90 P.3d at 351 (“Idaho recognizes that choses in action are generally assignable ... **An assignment of the chose in action transfers to the assignee and divests the assignor of all control and right to the cause of action, and the assignee becomes the real party in interest. [Thereafter,] only the assignee may prosecute an action on the chose in action**”) (citations omitted) (emphasis added).

In the instant matter, Pal's Claim of Exemption should be denied. First, the Court must apply I.C. § 11-301 as written. The relief sought by KeyBank is derived from statute, specifically, I.C. § 11-301. Accordingly, the task of this Court is to determine the meaning of the foregoing provision. Doing so requires the Court to resort to the rules of statutory interpretation. The rules thereof are well established. *See e.g. D & M Country Estates Homeowners Assoc. v. Romriell*, 138 Idaho 160, 165, 59 P.3d 965, 970 (2002) ("The starting point for any statutory interpretation is the literal wording of the statute. To determine the meaning of a statute, the Court applies the plain and ordinary meaning of the terms used. Where the language of a statute is unambiguous, there is no need to consult extrinsic evidence") (citations omitted) (emphasis added).<sup>3</sup> The literal and unambiguous language of I.C. § 11-301 permits the relief sought by KeyBank. As such, KeyBank may levy on Pal's appeal.

Second, the Court may not create an exception to I.C. § 11-301. The Court's role is to interpret the law and not to make it. If the Court were to decide that the levy sought by KeyBank is impermissible, it would in effect be making a judicial exception to an unambiguous statutory scheme. This is impermissible. *Blackburn v. State Farm Mutual Automobile Insurance Company*, 108 Idaho 85, 88, 697 P.2d 425, 428 (1985) ("In the field of legislation, the legislature is supreme. Courts must apply legislative enactments according to their plain terms") (internal

---

<sup>3</sup> The sentiment of the Idaho judiciary regarding statutory construction and/or interpretation is echoed in the Ninth Circuit. *See Freeman v. DirectTV, Inc.*, 457 F.3d 1001, 1004 (9<sup>th</sup> Cir. 2006) ("The starting point for the interpretation of a statute is always its language. If the plain language of statute renders its meaning reasonably clear, we will not investigate further unless its application leads to unreasonable or impracticable results") (citations omitted); *See also M.L. v. Mercer Island School District*, 575 F.3d 1025, 1037 (9<sup>th</sup> Cir. 2009) ("Plain meaning interpretation is a 'cardinal canon' of statutory construction") (citations omitted).

quotations omitted). The foregoing rule holds true even when judicial encroachment may yield a positive result or social benefit. Our Idaho Supreme Court's discussion in *Blackburn* is instructive on this point:

**"We do note, however, the anomaly presented by the circumstances, particularly that a holder of a policy containing uninsured motorist coverage may well be in a better position if a tortfeasor carries no insurance whatsoever rather than carrying the minimum coverage mandated by the statute. We note that the matter deserves legislative attention. While this Court could follow the example of the *Porter* and *Palisbo* decisions, such clearly would be to indulge in judicial legislation under the guise of statutory interpretation. In actuality, we are called upon to make a decision of policy. Such a policy decision should rest on factors militating for or against that decision. It may well be that the adoption of such a policy would result in an increase of insurance costs to the motoring public. That increase may be a large amount or a small amount. It may be that such a possible increase in premium is well warranted to protect against the results that presently flow from multiple victim accidents, the victims of which must go largely or partially uncompensated for their damages because of a quirk in the insurance laws. However, all of such questions should be dealt with on the basis of adequate information ... by a legislative body equipped and authorized to make such policy decisions. Again, we urge legislative attention to the inequitable results which flow from the language of our statutes."**

*Id.* at 90, 697 P.2d at 430 (emphasis added); *See also Electrical Wholesale Supply Co. Inc., v. Nielson*, 136 Idaho 814, 825, 41 P.3d 242, 253 (2002) ("The power invested to this Court is limited to interpretation of the constitution and laws and their application to the factual situations presented by the cases before the Court ... The power to make law and declare public policy is vested with the legislature. This Court will not intrude upon the province of the legislature").

Third, case law in other jurisdictions supports KeyBank's position. Specifically, *RMA Ventures* and *Applied Medical* presents a factual scenario that is very similar to that contained in the instant matter. As the levy and execution provisions in Utah are nearly the same as that in

Idaho, KeyBank submits that *RMA Ventures* and *Applied Medical* should be controlling on the issues raised in Pal's Claim of Exemption.

Fourth, Pal has the ability to stop this execution activity at any time simply by posting a cash deposit or filing a supersedeas bond of 136% of the amount of the judgment in accordance with IAR 13(b)(15). Pal should not be heard to complain of the unfairness or inequity of execution upon this money judgment when it has failed to avail itself of this simple means to obtain a stay.

In light of the foregoing, KeyBank is entitled to levy on the underlying Judgment. Accordingly, Pal's Claim of Exemption should be denied.

2.) Pal's Claim of Exemption should be denied because the relief sought by KeyBank has been granted by the Idaho Supreme Court in an analogous case.

In the recent case of *Smith v. Corlett*, S.Ct. Docket No. 37060-2009, our Idaho Supreme Court permitted Defendant Cathy Rosera ("Rosera") to satisfy a money judgment for attorney's fees and costs by levying on the appeal of the substantive decision which formed the basis of the foregoing judgment. *See generally* Affidavit of Alexander P. McLaughlin in Support of Motion Contesting Pal I, LLC's Claim of Exemption, Ex. D. The decision reversed an order entered by Judge Deborah A. Bail granting Plaintiff James M. Smith's ("Smith") Motion to Quash Levy.

In *Corlett*, Smith filed suit against Rosera alleging that she was liable to Smith for breach of contract, fraud, and negligent misrepresentation. After Smith's suit was filed, Rosera moved the District Court for summary judgment, seeking to dismiss the claims alleged by Smith. The

District Court granted Rosera's motion, awarded Rosera \$36,392.04 in attorney's fees and costs, and entered judgment for the foregoing amount.

Despite entry of judgment, Smith refused to offer any remuneration to Rosera. In order to satisfy the Judgment, Rosera sought a writ of execution. This effort also proved unavailing as the sheriff was unable to locate Smith or any of his assets. Thereafter, Rosera directed the sheriff to levy on the cause of action that Smith asserted against Rosera. Smith objected and filed an Ex Parte Motion for Order Temporarily Staying Sheriff's Sale and Motion for Order Quashing Notice of Levy. In response to the foregoing motion, Rosera filed an Objection to Ex Parte Motion for Order Temporarily Staying Sheriff's Sale and Motion for Order Quashing Notice of Levy, a Response to Plaintiff's Supplemental Memorandum in Support of Motion to Quash Levy and to Stay Execution, an Objection to Motion to Stay Execution as to Plaintiff's Rights in this Action Against Defendants, and a Reply to Plaintiff's Response Memorandum.

On June 9, 2010, a telephonic hearing was held on Smith's Motion for Order Quashing Notice of Levy and Motion to Stay Execution of the Judgment. The Honorable Deborah Bail stayed execution of the judgment and Rosera appealed, filing an Application to Vacate Stay Imposed by the District Court with the Supreme Court pursuant to IAR 13(g).

The Supreme Court granted the application and permitted Rosera to satisfy the judgment by levying on the cause of action/appeal that Smith had against Rosera. Thereafter, Rosera purchased the appeal for \$500.00 at a sheriff's sale and filed a motion to dismiss with the Supreme Court. The motion was granted by the Court and the appeal was dismissed. *Id.*, Ex. F.




Although not reported, the Court's decision in *Rosera* is a decision from the highest Court in Idaho and should therefore constitute extremely persuasive, if not binding, precedent on this Court. Given the similarities between *Rosera* and the case at bar, *Rosera* controls the disposition of the instant matter and mandates denial of Pal's Claim of Exemption.

V. CONCLUSION

KeyBank respectfully requests that this Court DENY the Claim of Exemption and permit levy and execution in the manner specified by KeyBank and award additional attorney's fees and costs pursuant to I.C. § 12-120(5).

DATED this 14<sup>th</sup> day of June, 2011.

GIVENS PURSLEY LLP



Alexander P. McLaughlin  
Attorneys for KeyBank National Association

CERTIFICATE OF SERVICE

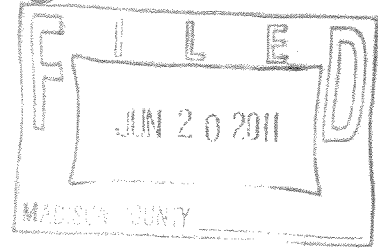
I HEREBY CERTIFY that on this 16<sup>th</sup> day of June, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES, PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

☒ Via U.S. Mail  
☐ Via Hand-Delivery  
☐ Via Overnight Delivery  
☒ Via Facsimile 208-529-4166

  
Alexander P. McLaughlin

COPY



Thomas E. Dvorak (ID State Bar ID# 5043)  
Alexander P. McLaughlin (ID State Bar ID# 7977)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
1079991\_1 [10894-2]

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

AFFIDAVIT OF ALEXANDER P.  
MCLAUGHLIN IN SUPPORT OF  
MOTION CONTESTING PAL I,  
LLC'S CLAIM OF EXEMPTION

STATE OF IDAHO )  
 )ss  
County of Ada )

ALEXANDER P. MCLAUGHLIN, being first duly sworn upon oath, deposes and states:  
|

1.) I am one of the attorneys for the Plaintiff in the above-entitled action. Accordingly, I have personal knowledge of the facts herein and make this affidavit on the basis of such personal knowledge and belief.

2.) Attached hereto as Exhibit "A" and incorporated herein by this reference is a true, accurate, and complete copy of the Claim of Exemption filed by Pal I, LLC ("Pal") on or about June 13, 2011.

3.) Attached hereto as Exhibit "B" and incorporated herein by this reference is a true, accurate, and complete copy of an email received by this office on or about March 23, 2011, from B.J. Driscoll, counsel for Pal.

4.) Attached hereto as Exhibit "C" and incorporated herein by this reference is a true, accurate, and complete copy of the letter of instructions sent to the Bonneville County Sheriff's Office on or about May 19, 2011. The foregoing letter was accompanied by a writ of execution, a true and accurate copy of which is attached hereto as Exhibit "D" and is incorporated herein by this reference.

5.) Attached hereto as Exhibit "E" and incorporated herein by this reference is a true, accurate, and complete copy of Cathy Rosera's Motion to Dismiss the Appeal of James M. Smith and the Affidavit of Terry C. Copple in Support of Motion to Dismiss the Appeal of

James M. Smith. I personally copied each of the foregoing items and attachments from their original file in the custody of the Idaho Supreme Court.

6.) Attached hereto as Exhibit "F" and incorporated herein by this reference is a true, accurate, and complete copy of the Idaho Supreme Court's Order Granting Motion to Dismiss, stemming from *Smith v. Corlett*, ID.S.Ct., Docket No. 37060-2009.

DATED this 16<sup>th</sup> day of June, 2011.

  
Alexander P. McLaughlin

SUBSCRIBED AND SWORN to before me this 16<sup>th</sup> day of June, 2011.



  
NOTARY PUBLIC FOR IDAHO

Residing at Boise, Idaho

My commission expires:

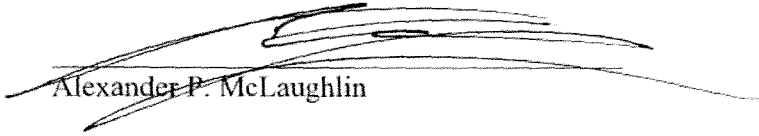
3-22-2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1<sup>st</sup> day of June, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES,  
PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

- ☐ Via U.S. Mail
- ☐ Via Hand-Delivery
- ☐ Via Overnight Delivery
- ☒ Via Facsimile 208-529-4166

  
Alexander P. McLaughlin

**EXHIBIT A**

Bryan D. Smith, Esq. – ISBN 4411  
B. J. Driscoll, Esq. – ISBN 7010  
SMITH, DRISCOLL & ASSOCIATES, PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166

Attorneys for Defendant/Appellant  
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;  
BRIAN CHRISTENSEN, an individual; L.A.  
PARKINSON, an individual; BARNEY DAIRY,  
INC.; D.J. BARNEY, an individual; WILLIAM  
DAVIS, an individual; LOIS DAVIS, an  
individual; DELL RAY BARNEY, an individual;  
and DELL J. BARNEY, an individual, dba  
Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

CLAIM OF EXEMPTION

1. I claim an exemption from levy for the following described money and/or property:

- a) Money, including money in a bank account, which was paid to me or my family as:
- \_\_\_\_\_ Public assistance of any kind
  - \_\_\_\_\_ Social Security or SSI
  - \_\_\_\_\_ Worker's compensation
  - \_\_\_\_\_ Unemployment benefits
  - \_\_\_\_\_ Child Support
  - \_\_\_\_\_ Retirement, pension, or profit sharing benefits
  - \_\_\_\_\_ Military or veteran's benefits
  - \_\_\_\_\_ Life insurance or other insurance
  - \_\_\_\_\_ Disability, illness, medical or hospital benefits
  - \_\_\_\_\_ Alimony, support or maintenance
  - \_\_\_\_\_ Annuity contract benefits
  - \_\_\_\_\_ Bodily injury or wrongful death awards

CLAIM OF EXEMPTION -- Page 1

F:\CLIENTS\BDS\8308\Pleadings\019 Claim of Exemption.doc

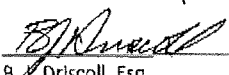
CIVIL  
2011 JUN 13 PM 4:28  
CLERK  
COUNTY  
OF  
IDAHO



\_\_\_\_ Other money (describe) \_\_\_\_\_  
\_\_\_\_ Wages (Do not check this box until you have first talked to your employer to see if he/she correctly calculated your exemption according to the formula under item 28 on the form entitled "SOME EXEMPTIONS TO WHICH YOU MAY BE ENTITLED." Then check this box only if you believe your employer's calculation is incorrect.

## b) Property,

\_\_\_\_ Professional books  
\_\_\_\_ Burial plots  
\_\_\_\_ Health aids  
\_\_\_\_ Homestead, house, mobile home and related structures  
\_\_\_\_ Jewelry  
\_\_\_\_ Car, truck or motorcycle  
\_\_\_\_ Tools and implements  
\_\_\_\_ Appliances, furnishings, firearms, animals, musical instruments, books, clothes, family portraits and heirlooms  
☒ Other property (describe) Defendant PAL I, LLC ("PAL") objects to the Plaintiff's purported execution by levy and attachment on the grounds that the exact property that the Plaintiff has attempted to levy upon is unclear from its writ and notice. Further, PAL claims that "all debts and credits owing to [it] . . . including but not limited to [its] claim, cause of action and appeal in this matter" purportedly levied upon by the Bonneville County Sheriff are exempt from levy by execution on the following grounds: (1) PAL's right to appeal the judgment entered in this case in favor of Plaintiff is not subject to execution to satisfy that same judgment from which PAL appeals; (2) Plaintiff's execution has violated Idaho Code Sections 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301; and (3) Plaintiff violated Idaho Rule of Civil Procedure 5.

  
B. Driscoll, Esq.  
Attorney for Defendant, PAL I, LLC

P.O. Box 50731  
Address

Idaho Falls, ID 83405  
City, State Zip

208-524-0731  
Phone Number

Return to: Bonneville Sheriff, 605 N. Capital Ave., Idaho Falls, ID 83402

**EXHIBIT B**

**Lisa Hughes**

---

**From:** Amber N. Dina [amberdina@givenspursley.com]  
**Sent:** Thursday, March 24, 2011 8:57 AM  
**To:** 'B.J. Driscoll'  
**Cc:** Thomas E Dvorak  
**Subject:** RE: KeyBank v. PAL [IWVOV-GPDMS.FID446441]

B.J., Thanks for letting me know.

Amber N. Dina  
Givens Pursley LLP  
P.O. Box 2720  
Boise, ID 83701  
Direct Dial: (208) 388-1244  
Facsimile: (208) 388-1300  
E-Mail: [AmberDina@givenspursley.com](mailto:AmberDina@givenspursley.com)  
[www.givenspursley.com](http://www.givenspursley.com)

CONFIDENTIALITY NOTICE: This e-mail contains confidential information that is protected by the attorney-client and/or work product privilege. It is intended only for the use of the individual(s) named as recipients. If you are not the intended recipient of this e-mail, please notify the sender, please do not deliver, distribute or copy this e-mail, or disclose its contents or take any action in reliance on the information it contains.

---

**From:** B.J. Driscoll [mailto:BJD@eidaholaw.com]  
**Sent:** Wednesday, March 23, 2011 5:01 PM  
**To:** Amber N. Dina  
**Subject:** KeyBank v. PAL

Amber,

I spoke to my client today. We will not be posting any surety bond or security to stay execution at this time.

Best regards,

B. J. Driscoll, Esq.  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Tel: (208) 524-0731  
Fax: (208) 529-4166  
Email: [bjd@eidaholaw.com](mailto:bjd@eidaholaw.com)

## **EXHIBIT C**

CIVIL # 201103866

GIVENS PURSLEY LLP

11 MAY 31 PM 2:46

LAW OFFICES  
601 W. Bannock Street  
PO Box 2720, Boise, Idaho 83701  
TELEPHONE: 208 388-1200  
FACSIMILE: 208 388-1300  
WEBSITE: www.givenspursley.com

Gary G. Allen  
Peter G. Barton  
Christopher J. Beeson  
Cindi R. Bolinder  
Erik J. Bolinder  
Jeremy C. Chou  
William C. Cole  
Michael C. Creamer  
Amber N. Dima  
Elizabeth M. Donick  
Kristin Bjorkman Dunn  
Thomae E. Dvoretz  
Jeffrey C. Faraday  
Justin M. Fredin  
Marlin C. Hendrickson

Steven J. Hippeler  
Donald E. Krickrehm  
Debra K. Kristensen  
Anne C. Kunkel  
Michael P. Lawrence  
Franklin G. Lee  
David R. Lombardi  
John M. Marshall  
Emily L. McClure  
Kenneth R. McClure  
Kelly Greene McConnell  
Cynthia A. Melillo  
Christopher H. Meyer  
L. Edward Miller  
Patrick J. Miller

Judson B. Montgomery  
Deborah E. Nelson  
Kelsey J. Nunoz  
W. Hugh O'Riordan, LL.M.  
Angela M. Reed  
Justin A. Steiner  
Conley E. Ward  
Robert B. White

RETIRED  
Kenneth L. Pursley  
James A. McClure  
Raymond D. Givens (1917-2008)

May 19, 2011

Bonneville County Sheriff  
Attention: Civil Division  
Law Enforcement Building  
605 N Capital, Room #117  
Idaho Falls, ID 83402

Re: *KeyBank National Association v. PAL I, LLC, et al*  
Madison County District Court Case No. CV-10-680

Dear Civil Deputy:

Enclosed are the following documents with regard to the above-referenced matter:

1. The original plus 5 copies of a Writ of Execution;
2. Five copies of a Notice of Attachment and Levy;
3. Five copies of Legal Notice and Exemption Forms;
4. Envelopes addressed to Judgment Debtor and to counsel of record; and
5. A check payable to Bonneville County Sheriff for \$40.00 as payment of fees for service and return of the Writ.

Please **PERSONALLY** serve the Writ of Execution and Notice of Attachment and Levy, together with the Legal Notice and Exemption Forms on Judgment Debtor PAL I, LLC at the address below. Please attach and levy upon all goods, chattels, moneys and other property, both real and personal, or any interest therein of Judgment Debtor, not exempt by law, in pursuance of the writ, and further attach and levy upon the debts and credits and other personal property not capable of manual delivery, specifically including but not limited to Defendant PAL I, LLC's claim, cause of action, and appeal rights associated with this matter, Madison County District Court Case No. CV-2010-680, Idaho Supreme Court/Court of Appeals Docket No. 38645, to be seized and held under attachment in the action, belonging to Defendant PAL I, LLC, to be noticed up and sold by the Sheriff at a public sale, in accordance with Idaho Code.

Bonneville County Sheriff's Office  
May 19, 2011  
Page 2

**PAL I, LLC**  
Registered Agent Gregory P. Meacham  
2000 Jennie Lee Dr  
Idaho Falls, ID 83404

Time is of the essence. We request that you make every effort to make a first attempt to attach and levy upon the judgment debtor's property as soon as practicable.

In the event your office receives a claim of exemption, please notify this office by telephone, as well as by delivering or mailing a copy within one (1) business day of your receipt as required by Idaho Code § 11-203(a).

**Please contact us for further instruction prior to return of the writ.**

Thank you in advance for your prompt assistance with this matter. If you have any questions or need any additional information, please contact me at (208) 388-1245 or my paralegal, Susan Heneise, at (208) 388-1284.

Very truly yours,



Thomas E. Dvorak

TED/smh  
Enclosures  
1169509\_1

## **EXHIBIT D**

Thomas E. Dvorak (ID State Bar ID #5043)  
Amber N. Dina (ID State Bar ID #7708)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
1157951\_1 [10894-2]

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

**WRIT OF EXECUTION –  
BONNEVILLE COUNTY**

**THE PEOPLE OF THE STATE OF IDAHO**

**TO: THE SHERIFF OF BONNEVILLE COUNTY, GREETINGS:**



WHEREAS, on the 3rd of January, 2011, Plaintiff recovered a Judgment in the above-titled Court, against Defendant PAL I, LLC, as follows:

Judgment	\$16,884.41
Interest from January 3, 2011 through May 10, 2011	\$313.29
Cost for Issuance of Writ of Execution	\$2.00
<b>TOTAL DUE AND OWING (as of May 11, 2011)</b>	<b>\$17,199.70</b>

AND WHEREAS, the Judgment roll in this action in which said Judgment was entered is filed in the Clerk office of said Court, in the County of Madison, State of Idaho, and said Judgment was docketed in the office of the Clerk of said Court, in said County on January 3, 2011, and the total due and owing shown above, with interest calculated through May 10, 2011, is now at the date of this Writ actually due on said Judgment.


NOW, THEREFORE, you, said Sheriff, are hereby required to satisfy said Judgment, with interest as aforesaid, out of the personal property of said Defendant PAL I, LLC, judgment debtor, including but not limited to equipment, inventory, accounts receivable, chattel paper, instruments, negotiable documents of title, general intangibles, and any other property, at any location where such personal property is kept by Defendant PAL I, LLC, or if sufficient personal property cannot be found then out of the real property located within your county belonging to said judgment debtor on the date upon which said Judgment was docketed in Madison County, or at any time thereafter,

and make return of the Writ within sixty (60) days after receipt hereof, with what you have done endorsed thereon.

ATTEST my hand and the seal of said Court this 16 day of May, 2011.

**Kim H. Muir**

~~MARILYN R. RASMUSSEN~~, CLERK  
OF THE COURT

By:   
Deputy Clerk

## **EXHIBIT E**

2011 FEB 11 P 4:03

IN THE SUPREME COURT OF THE STATE OF IDAHO

ORIGINAL

vs.

ANTHONY C. D'ANGELO and JUDY L.  
D'ANGELO, husband and wife, and  
WHISTLER POINT, LLC, an Idaho limited  
liability company,

Third-Party Defendants/  
Cross-Respondents.

\*\*\*

COMES NOW, Defendants/Respondents Joe Corlett and Cathy Rosera (hereinafter collectively referred to as "Rosera"), by and through their attorneys of record, Terry C. Copple and Alexander P. McLaughlin, of the firm Davison, Copple, Copple & Copple of Boise, Idaho and hereby move this Court pursuant to Rule 32(a) and (b) and Rule 33 of the Idaho Appellate Rules ("IAR") for an Order Dismissing the Appeal of James M. Smith.

This Motion is made on the grounds and for the reasons that Appellant James M. Smith ("Smith") is no longer the lawful owner and holder of the claims involved in this action and appeal. The reason for this is that at a Sheriff's Sale dated February 10, 2011, Rosera purchased "the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited

liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy Rosera, Idaho Supreme Court Docket No. 37060-2009.”

The transfer of the causes of action and appeal from Smith to Rosera is evidenced by the “Certificate of Sale” issued by the sheriff following the sale. See e.g. I.C. § 11-309 (“When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all right which the debtor had in such property”) (emphasis added). A true and accurate copy of the “Certificate of Sale” is attached as Exhibit “L” to the Affidavit of Terry C. Copple in Support of Rosera’s Motion to Dismiss the Appeal of James M. Smith. As Smith has been divested of his interest in this matter, and Rosera now holds title to Smith’s causes of action, appeal, and all rights and interest therein, Rosera constitutes the “appealing party” under IAR 32(b). Pursuant to the foregoing provision, Rosera moves this Court to dismiss the appeal at issue with prejudice, with the parties to bear their own attorney’s fees and costs.

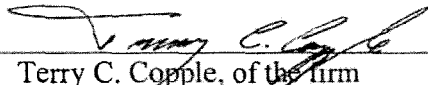
This Motion is also made on the grounds and for the reasons that because Smith no longer has any rights or interest in this appeal, no relief by the Court could provide redress to

Smith. Accordingly, this matter must be dismissed because Smith lacks standing and because the foregoing sheriff's sale and purchase have rendered the issues herein moot. See e.g. Bradshaw v. State, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991) (“[A] case becomes moot when ‘the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome’”) (emphasis added) (citing with approval Murphy v. Hunt, 455 U.S. 478, 481 (1982)); See also Lake v. Newcomb, 140 Idaho 190, 90 P.3d 1272 (Ct. App. 2004) (“Thus, a claim is moot if even a favorable decision on the issues would not result in any relief to the claimant”) (citing Murphy, supra) (emphasis added); See also Bagley v. Thomason, 149 Idaho 806, \_\_\_, 241 P.3d 979, 980 (2010) (“The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated ... To satisfy the requirement of standing litigants must allege ... a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury”) (emphasis added) (citations and internal quotations omitted). In any event, Rosera, as the owner of the appeal, hereby voluntarily dismisses this matter.

This Motion is based on the records and files herein and the Affidavit of Terry C. Copple in Support of Motion to Dismiss the Appeal of James M. Smith, filed concurrently herewith. Oral argument is requested on this Motion.

DATED this 11<sup>th</sup> day of February, 2011.

DAVISON, COPPLE, COPPLE & COPPLE, LLP


By:   
Terry C. Copple, of the firm  
Attorneys for Defendants/Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11<sup>th</sup> day of February, 2011, I caused to be served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Bruce S. Bistline  
Gordon Law Offices, Chtd.  
623 West Hays Street  
Boise, Idaho 83702-5512

William R. Snyder  
William R. Snyder & Associates, P.A.  
520 West Franklin Road, Upper Level  
Boise, Idaho 83702

  
Terry C. Copple



TERRY C. COPPLE (ISB No. 1925)  
 ALEXANDER P. MCLAUGHLIN (ISB No. 7977)  
 DAVISON, COPPLE, COPPLE & COPPLE, LLP  
 Attorneys at Law  
 Chase Capitol Plaza  
 Post Office Box 1583  
 199 North Capitol Boulevard  
 Suite 600  
 Boise, Idaho 83701  
 Telephone: (208) 342-3658  
 Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[mclaughlin@davisoncopples.com](mailto:mclaughlin@davisoncopples.com)

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Attorneys for Defendants/Respondents  
 Cathy Rosera and Joe Corlett

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES M. SMITH, a single person,	)	Supreme Court Docket No. 37060-2009
	)	
Plaintiff/Appellant,	)	AFFIDAVIT OF TERRY C. COPPLE
	)	IN SUPPORT OF MOTION TO DISMISS
vs.	)	THE APPEAL OF JAMES M. SMITH
	)	
JOE CORLETT and CATHY ROSERA,	)	
	)	
Defendant/Respondents,	)	
and	)	
	)	
JOE CORLETT,	)	
	)	
Third Party Plaintiff/	)	
Cross-Appellant,	)	
	)	
vs.	)	

AFFIDAVIT OF TERRY C. COPPLE IN SUPPORT OF MOTION TO DISMISS THE APPEAL OF JAMES M. SMITH - 1

FILED - ORIGINAL  
 FEB 11 2011  
 Supreme Court  
 Entered on ATS by

ORIGINAL

ANTHONY C. D'ANGELO and JUDY L. )  
D'ANGELO, husband and wife, and )  
WHISTLER POINT, LLC, an Idaho limited )  
liability company, )  
Third-Party Defendants/ )  
Cross-Respondents. )

---

\* \* \*

STATE OF IDAHO )  
) ss.  
County of Ada )

TERRY C. COPPLE, being first duly sworn on oath, deposes and says that:

I am one of the attorneys of record for Defendants/Respondents Cathy Rosera and Joe Corlett (hereinafter collectively referred to as "Rosera"). Accordingly, I have personal knowledge of the facts contained herein and make this Affidavit based upon such personal knowledge and belief.

This lawsuit was initiated by Smith against Rosera. In the foregoing suit, Smith asserted that Rosera was allegedly liable to Smith for breach of contract, fraud, and negligent misrepresentation. After Smith filed suit, Rosera moved the District Court for summary judgment, seeking to dismiss all of the claims alleged by Smith. The District Court granted Rosera's motion, awarded Rosera \$36,392.04 in attorney's fees and costs, and entered its Supplemental Summary Judgment/Supplemental Judgment for Taxation of Costs and Determination of Award of Reasonable Fees ("Judgment") for the foregoing amount. A true and

AFFIDAVIT OF TERRY C. COPPLE IN SUPPORT OF MOTION TO DISMISS THE APPEAL OF JAMES M. SMITH - 2

accurate copy of the Judgment is attached hereto as Exhibit "A" and is incorporated herein by this reference. Thereafter, Smith filed a Notice of Appeal.

Despite entry of Judgment, Smith has refused to pay any amount thereof. This is also despite the fact that Rosera sent several demand letters to Smith specifically requesting payment. In an attempt to procure remuneration for the amount of the Judgment, Rosera sought and obtained a writ of execution. However, this effort also proved unavailing as the sheriff was unable to locate Smith or any of his assets.

Smith's success at avoiding payment prompted Rosera to direct the sheriff to levy on the causes of action and appeal that Smith asserted against Rosera. Smith objected and filed an Ex Parte Motion for Order Temporarily Staying Sheriff's Sale and Motion for Order Quashing Notice of Levy. On June 9, 2010, a telephonic hearing was held on Smith's Motion for Order Quashing Notice of Levy and Motion to Stay Execution of the Judgment. The Honorable Deborah A. Bail granted Smith's motion and stayed execution.

Following Judge Bail's ruling, Rosera filed an Application to Vacate Stay Imposed by the District Court with the Supreme Court. In the foregoing application, Rosera specifically sought to vacate the stay imposed by the District Court, thereby allowing Rosera to levy on Smith's cause of action and appeal against Rosera. A true and accurate copy of Rosera's Application to Vacate Stay Imposed by the District Court is attached hereto as Exhibit "B" and is incorporated herein by this reference.

At approximately the same time, Smith filed an Application for Order Staying Execution

as to Plaintiff's Rights in this Action Against Defendants. A true and accurate copy of the foregoing application is attached hereto as Exhibit "C" and is incorporated herein by this reference.

Upon review of the respective applications, this Court granted Rosera's application and denied Smith's. A true and accurate copy of this Court's Order Granting Application to Vacate Stay is attached hereto as Exhibit "D" and is incorporated herein by this reference. Also attached hereto as Exhibit "E" and incorporated herein by this reference is a true and accurate copy of this Court's Order Re: Stay.

Despite Smith's representation that his application would finalize the issue, on January 24, 2011, Smith filed a Second Application of James M. Smith for Order Staying all Attempts to Execute Upon the Judgment Herein by Levying Upon the Plaintiff's Rights in this Action, a Verified Application of James M. Smith for Waiver of Bond on Grounds of Indigence, and an Application of James M. Smith for Order Staying Sheriff's Sale Scheduled for February 10, 2011.

In its Order Denying Application for Stay, this Court considered each of the foregoing applications and denied them in their entirety. A true and accurate copy of the Order Denying Application for Stay is attached hereto as Exhibit "F" and is incorporated herein by this reference.

Following the Court's Order Re: Stay, Rosera obtained a Second Writ of Execution from the District Court in order to levy on Smith's causes of action and appeal to satisfy the Judgment.

A true and accurate copy of the foregoing writ is attached hereto as Exhibit "G" and is incorporated herein by this reference. The Second Writ of Execution was then sent to the Ada County Sheriff's Office along with a Second Notice of Levy, Second Notice of Sheriff's Sale, and Notice. Each of the foregoing documents and a claim of exemption form were properly served on the parties herein. A true and accurate copy of the Affidavit of Service is attached hereto as Exhibit "H" and is incorporated herein by this reference.

The Second Notice of Sheriff's Sale expressly states that a sale would take place on February 10, 2011, at 10:00 a.m., and that at the sale, the sheriff would levy upon:

[T]he claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy Rosera, Idaho Supreme Court Docket No. 37060-2009.

A true and accurate copy of the Second Notice of Sheriff's Sale is attached hereto as Exhibit "I" and is incorporated herein by this reference; a true and accurate copy of the Second Notice of Levy is attached hereto as Exhibit "J" and is incorporated herein by this reference. Additionally, a true and accurate copy of the Notice is attached hereto as Exhibit "K" and is incorporated herein by this reference.

Consistent with the terms of the Second Notice of Sheriff's Sale, on February 10, 2011, a

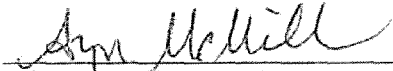
sale of Smith's causes of action and appeal against Rosera was held on the steps of the Public Safety Building located at 7200 Barrister Drive, Boise, Idaho 83704. The undersigned was in attendance and, on behalf of Rosera, entered the highest bid. After the sale, Rosera was issued a Certificate of Sale by the sheriff's office. I certify that a true and accurate copy of the Certificate of Sale is attached hereto as Exhibit "L" and is incorporated herein by this reference.

As a result of the sale and subsequent issuance of the Certificate of Sale, Smith has been divested of any and all interest in Smith's causes of action against Rosera and his appeal of Judge Bail's adverse decision. Accordingly, Rosera now owns each of the foregoing and all rights therein. As Smith no longer has an interest in the matter at bar, Smith lacks standing to pursue the appeal and the issues he has raised are now moot. Based on the foregoing, dismissal of the above-captioned matter is appropriate. Accordingly, Rosera respectfully requests that this Court grant her Motion to Dismiss the Appeal of James M. Smith and thereby finally terminate this action.

DATED this 11<sup>th</sup> day of February, 2011.

  
TERRY C. COPPLE

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of February, 2011.

  
NOTARY PUBLIC FOR IDAHO  
Residing at Boise, Idaho  
My commission expires: 10/15/11

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11<sup>th</sup> day of February, 2011, I caused to be served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Bruce S. Bistline  
Gordon Law Offices, Chtd.  
623 West Hays Street  
Boise, Idaho 83702-5512

William R. Snyder  
William R. Snyder & Associates, P.A.  
520 West Franklin Road, Upper Level  
Boise, Idaho 83702

  
\_\_\_\_\_  
Terry C. Copple





RECEIVED

JAN 07 2010

Ada County Clerk

COPY

NO. FILED  
A.M. P.M. 1:30

JAN 15 2010

J. DAVID NAVARRO, Clerk  
By *[Signature]*  
DEPUTY

TERRY C. COPPLE (ISB No. 1925)  
ALEX P. MCLAUGHLIN (ISB No. 7977)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
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[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[mclaughlin@davisoncopples.com](mailto:mclaughlin@davisoncopples.com)

Attorneys for Defendants Joe Corlett and Cathy Rosera  
and Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH,	)	Case No. CV OC 0809440
	)	
Plaintiff,	)	
	)	
vs.	)	SUPPLEMENTAL SUMMARY
	)	JUDGMENT
	)	
JOE CORLETT and CATHY ROSERA,	)	
	)	
Defendants,	)	
	)	
_____	)	
JOE CORLETT,	)	
	)	
Third-Party Plaintiff,	)	
vs.	)	

SUPPLEMENTAL SUMMARY JUDGMENT - 1

EXHIBIT  
*A*

	)
ANTHONY C. D'ANGELO and JUDY L.	)
D'ANGELO, husband and wife, and	)
WHISTLER POINT, LLC, an Idaho limited	)
liability company,	)
	)
Third-Party Defendants.	)
_____	)

\* \* \*

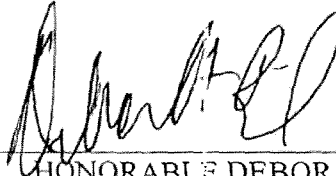
THIS MATTER having come regularly before the Court upon the Motions for Summary Judgment and/or Motion to Dismiss filed by Defendants Joe Corlett and Cathy Rosera, and Third-Party Defendants Anthony C. D'Angelo, Judy L. D'Angelo and Whistler Point, LLC, and the Court having considered the oral argument of counsel, Affidavits filed by the parties and the parties' Briefs, and the Court having thereafter issued its June 10, 2009, Decision and Order Re: Motion for Summary Judgment, finding that there is no genuine issue as to any material fact and the moving parties are entitled to Judgment as a matter of law and the Court having further considered Plaintiff James M. Smith's Motion to Disallow Attorney's Fees and Costs to Defendants Joe Corlett and Cathy Rosera, Defendants' Motion to Disallow Attorney's Fees and Costs, and Third-Party Defendants' Motion to Disallow Third-Party Plaintiffs' Costs Claimed Against Third-Party Defendants Under Rule 54(d)(1) and Motion to Disallow Third-Party Plaintiffs' Attorney Fees Claimed Against Third-Party Defendants Under Rule 54(e)(1), and Statement of Third-Party Defendants' Objection to Third-Party Plaintiffs' Claimed Costs Per Rule 54(d)(6) and Statement of Objections to Third-Party Plaintiffs' Claimed Attorney Fees Per

Rule 54(e)(6), and the Court having considered the oral argument of counsel, the affidavits and briefing submitted by the parties, and the Court having thereafter issued its December 16, 2009 Decision and Order Re: Attorney Fees and Costs, awarding attorney fees against Smith in the amount of \$35,099.00 and costs against Smith in the amount of \$1,293.04, as well as attorney fees against Mr. Corlett and Ms. Rosera in the amount of \$37,500.00 and costs against Mr. Corlett and Ms. Rosera in the amount of \$1,228.04, and in accordance therewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all claims filed by Plaintiff James M. Smith against Defendants Joe Corlett and Cathy Rosera be and hereby are dismissed with prejudice, and that by virtue thereof, the indemnification claim filed by Joe Corlett and Cathy Rosera against Third-Party Defendants Anthony C. D'Angelo, Judy L. D'Angelo and Whistler Point, LLC be and hereby are dismissed *with prejudice*

IT IS HEREBY ~~FURTHER~~ ORDERED, ADJUDGED AND DECREED that: Defendants Joe Corlett and Cathy Rosera have and recover judgment against Plaintiff James M. Smith in the amount of ~~\$36,292.04~~ plus interest thereon at the statutory rate as provided by law from the date of this judgment until paid, and Third-Party Defendants Anthony and Judy D'Angelo have and recover judgment against Defendants Joe Corlett and Cathy Rosera in the amount of \$38,728.04 plus interest thereon at the statutory rate as provided by law from the date of this Judgment until paid.

DATED this 15<sup>th</sup> day of January, 2010.



HONORABLE DEBORAH A. BAIL

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15<sup>th</sup> day of January, 2010, I caused to be served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Bruce S. Bistline  
Gordon Law Offices, Chtd.  
623 West Hays Street  
Boise, Idaho 83702-5512

William R. Snyder  
Leo Shishmanian  
William R. Snyder & Associates, P.A.  
520 West Franklin Road, Upper Level  
Boise, Idaho 83702

Terry C. Copple  
Davison, Copple, Copple & Copple  
Post Office Box 1583  
Boise, Idaho 83701

**J. DAVID NAVARRO**



Clerk

William R. Snyder, ISB #1426  
William R. Snyder & Associates, P.A.  
520 W. Franklin St.  
Post Office Box 2338  
Boise, Idaho 83701-2338  
Telephone: 208 - 336 - 9080  
Facsimile: 208 - 343 - 4539  
Attorney for Third-Party Defendants

**COPY**  
NO. \_\_\_\_\_  
AM. \_\_\_\_\_  
JAN 15 2010  
J. DAVID NAVAREJO, Clerk  
By SAROL LUEDTKE  
DEPUTY

**COPY**

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH,

Plaintiff,

vs.

JOE CORLETT and CATHY ROSERA,

Defendants.

---

JOE CORLETT,

Third-Party Plaintiff,

and

CATHY ROSERA,

Third-Party Plaintiff,

vs.

ANTHONY C. D'ANGELO and JUDY L.  
D'ANGELO, husband and wife, and WHISTLER  
POINT, LLC, an Idaho limited liability company,

Third-Party Defendants.

---

Case No. CV OC 0809440

**SUPPLEMENTAL JUDGMENT  
FOR TAXATION OF COSTS  
AND DETERMINATION OF  
AWARD OF REASONABLE  
ATTORNEY FEES**

The Court having issued its Decision and Order Re: Attorney Fees and Costs on December 15, 2009, which Decision and Order was entered on December 16, 2009; and

To comply with I.R.C.P 58(a) requiring a court to enter judgment “. . . upon a decision by the court that a party shall recover . . . costs . . .”, and pursuant to the authority of I.A.R. 13(b)(9) that authorizes the District Court “. . . to make any order regarding the taxing of costs or determination of attorney fees incurred in the trial of the action”;

IT IS THE ORDER AND JUDGMENT of this Court, AND THIS DOTH ORDER THAT:

1. Defendants JOE CORLETT and CATHY ROSERA, jointly, shall have and take, as a Supplemental Judgment (to the Judgment entered on June 22, 2009), their costs in the amount of \$1,293.04, and an award of reasonable attorney fees in the amount of \$35,099.00, as the prevailing party in those claims brought by Plaintiff JAMES M. SMITH, for a total monetary judgment sum of \$36,392.04 against JAMES M. SMITH together with the other relief provided for by the prior June 22, 2009 Judgment; and,

2. Third-Party Defendants ANTHONY C. D'ANGELO AND JUDY L. D'ANGELO and WHISTLER POINT, LLC, jointly, shall have and take, as a Supplemental Judgment (to the Judgment entered on June 22, 2009), their costs in the amount of \$1,228.04 and an award of reasonable attorney fees in the amount of \$37,500.00 as the prevailing party in those claims brought by the Third-Party Plaintiffs JOE CORLETT AND CATHY ROSERA, for a total monetary judgment sum of \$38,728.04, jointly against JOE CORLETT and CATHY ROSERA, together with the other relief provided for by the prior June 22, 2009 Judgment.

It is so ORDERED.

Dated this 15<sup>th</sup> day of January, 2010.

15/ **DEBORAH A. BAIL**

Deborah A. Bail  
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of Jan, 2010, I caused a true and correct copy of the foregoing document to be served upon each of the following persons by the respective methods indicated below:

Bruce S. Bistline  
Gordon Law Offices, Chtd.  
623 West Hays Street  
Boise, ID 83702-5512  
Attorney for Plaintiff

☒ U.S. Mail  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile telecopy to 345 - 0050

Terry C. Copple  
Davison, Copple, Copple & Cox, LLP  
Post Office Box 1583  
Boise, ID 83701  
Attorney for Defendant

☒ U.S. Mail  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile telecopy to 386 - 9428

William R. Snyder  
William R. Snyder & Associates, P.A.  
Post Office Box 2338  
Boise, ID 83701  
Attorneys for Third Party Defendants

☒ U.S. Mail  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile telecopy to 343 - 4539

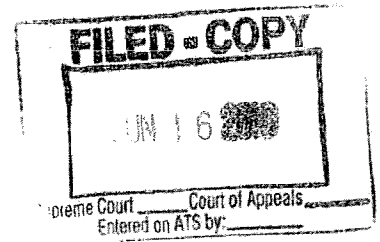
J. David Navarro,  
Clerk of the District Court

By CAROL LUEDTKA  
Deputy Clerk

**SEAL**







TERRY C. COPPLE (ISB No. 1925)  
ALEXANDER P. MCLAUGHLIN (ISB No. 7977)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
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Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[mclaughlin@davisoncopples.com](mailto:mclaughlin@davisoncopples.com)

Attorneys for Respondents and Cross Appellants

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES M. SMITH, a single person,	)	Supreme Court Docket No. 37060-2009
	)	
Plaintiff/Appellant,	)	
	)	APPLICATION TO VACATE STAY
vs.	)	IMPOSED BY THE DISTRICT COURT
	)	
JOE CORLETT and CATHY ROSERA,	)	
	)	
Defendant/Respondents,	)	
	)	
and	)	
	)	
JOE CORLETT,	)	
	)	
Third Party Plaintiff/	)	
Cross-Appellant,	)	
	)	
vs.	)	

APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT - 1



COPY

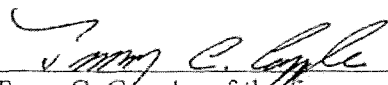
ANTHONY C. D'ANGELO and JUDY L.	)
D'ANGELO, husband and wife, and	)
WHISTLER POINT, LLC, an Idaho limited	)
liability company,	)
	)
Third-Party Defendants/	)
Cross-Respondents.	)
_____	)


\* \* \*

COMES NOW, Defendants/Respondents Joe Corlett and Cathy Rosera ("Rosera"), by and through their attorneys of record, Terry C. Copple and Alexander P. McLaughlin, of the firm Davison, Copple, Copple & Copple of Boise, Idaho and hereby submits this application pursuant to Idaho Appellate Rule 13(g) for an Order Vacating the Stay of Execution imposed by the District Court, thereby allowing Rosera to levy on Smith's cause of action and appeal against Rosera. This Application is made on the grounds and for the reasons that Rosera believes that the lower court committed legal error in granting Smith's Motion to Quash Levy and Motion to Stay Execution and acted in excess of its jurisdiction. This Application is based on the records and files herein, Rosera's Motion to Augment the Record, and Rosera's Memorandum in Support of Application to Vacate Stay Imposed by the District Court. Oral argument is requested on this Application.

DATED this 16<sup>th</sup> day of June, 2010.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By:   
Terry C. Copple, of the firm  
Attorneys for Defendant/Respondent


By:   
Alexander P. McLaughlin, of the firm  
Attorneys for Defendant/Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16<sup>th</sup> day of June, 2010, I caused to be served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Bruce S. Bistline  
Gordon Law Offices, Chtd.  
623 West Hays Street  
Boise, Idaho 83702-5512

William R. Snyder  
Leo Shishmanian  
William R. Snyder & Associates, P.A.  
520 West Franklin Road, Upper Level  
Boise, Idaho 83702

  
Alexander P. McLaughlin



Philip Gordon, ISBN 1996  
Bruce S. Bistline, ISBN 1988  
**GORDON LAW OFFICES, CHTD.**  
623 West Hays Street  
Boise, Idaho 83702  
Telephone: (208) 345-7100  
Facsimile: (208) 345-0050

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES M. SMITH,

Plaintiff/Appellant,

vs.

JOE CORLETT and CATHY ROSERA,

Defendants/Respondents.

Supreme Court Docket No. 37060-2009

APPLICATION OF JAMES SMITH FOR  
ORDER STAYING EXECUTION AS TO  
PLAINTIFF'S RIGHTS IN THIS ACTION  
AGAINST DEFENDANTS

JOE CORLETT,

Third Party Plaintiff/  
Cross-Appellant,

vs.

ANTHONY C. D'ANGELO and JUDY  
D'ANGELO, husband and wife, and Whistler  
Point, LLC, an Idaho Limited Liability  
Company,

Third Party Defendants/  
Cross-Respondents.

APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN  
THIS ACTION AGAINST DEFENDANTS

COPY



COMES NOW Plaintiff/Appellant James Smith (hereinafter "Smith") and hereby moves this Court for an order pursuant to I.A.R. Rule 13(g) for an Order partially staying execution of the Judgment entered in this action by the District Court so that no execution may proceed upon Smith's rights to pursue this action by appeal (which necessarily includes his right to appeal the award of attorneys' fees and costs which is basis for the money judgment upon which execution has been attempted). A Motion seeking similar relief was made to the District Court on May 18, 2010 and that Motion was granted by the District Court on June 9, 2010. On June 16, 2010, Defendants/Appellants filed an *Application to Vacate Stay Imposed by the District Court* in which they have argued, among other things, that for procedural reasons the District Court should denied Smith's Motion.


Smith recognizes that his remedy, had the District Court denied his Motion, would have been to seek the entry of an Order Staying Execution from this Court. The effect of a determination by this Court that the District Court should have denied the Motion below on grounds other than the substance of the issue, would then trigger Smith's right to have this Court consider his Application for a Stay of Execution. Rather than risking additional delays by having this matter return to the District Court only for Smith to bring it back to this Court, Smith is making this Application at this time. This way, whatever the outcome, this distraction from addressing the issues of this appeal can be resolved once and for all.

This Application relies upon the facts as demonstrated in the portion of the record in these proceedings as identified in the Defendant/Appellants' *Motion to Augment the Record* filed June 16, 2010, Smith's indigence and the undesigned's lien claim as documented in Smith's

APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS

*Motion to Augment the Record* filed June 18, 2010 and this Application is supported by the Memorandum Responding to Application to Vacate Stay Imposed by the District Court and Supporting Application of James Smith for Order Staying Execution as to Plaintiff's Rights in this Against Defendants.

DATED this 30<sup>th</sup> day of June, 2010.


  
Bruce S. Bistline

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of June, 2010, I caused the foregoing to be delivered by the method indicated below and addressed to the following:

Terry C. Copple  
Davison, Copple, Copple & Cox, LLP  
Washington Mutual Capitol Plaza  
PO Box 1583  
199 North Capitol Blvd, Suite 600  
Boise, Idaho 83701

☐ HAND DELIVERED  
☐ U.S. MAIL  
☐ OVERNIGHT MAIL  
☒ FACSIMILE 208-386-9428

  
Bruce S. Bistline

APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN  
THIS ACTION AGAINST DEFENDANTS





# In the Supreme Court of the State of Idaho

JAMES M. SMITH, a single person )

Plaintiff-Appellant, )

v. )

JOE CORLETT, )

Defendant- Third Party Plaintiff- )  
Respondent, )

and )

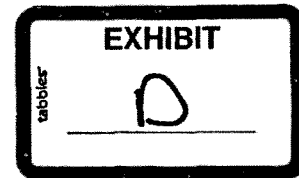
CATHY ROSERA, )

Defendant-Respondent, )

v. )

ANTHONY C. D'ANGELO and JUDY )  
D'ANGELO, husband and wife, and )  
WHISTLER POINT, LLC, an Idaho limited )  
liability company, )

Third Party Defendants. )



ORDER GRANTING APPLICATION  
TO VACATE STAY

Supreme Court Docket No. 37060-2009  
Ada County Docket No. 2008-9440

Ref. No. 10-294

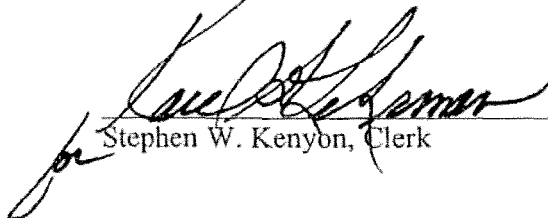
1. An APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT and a MEMORANDUM IN SUPPORT OF APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT were filed by counsel for Respondents on June 16, 2010.
2. An APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS and a MEMORANDUM RESPONDING TO APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT AND SUPPORTING APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS were filed by counsel for Appellant on June 30, 2010.

3. An OBJECTION TO THE APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS and a REPLY MEMORANDUM IN SUPPORT OF APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT were filed by counsel for Respondents on July 12, 2010.
4. A REPLY TO DEFENDANTS' OBJECTION TO THE APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS was filed by counsel for Appellant on July 28, 2010.

The Court is fully advised; therefore, good cause appearing,  
IT HEREBY IS ORDERED that Respondents' APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT be, and hereby is, GRANTED.

DATED this 22<sup>nd</sup> day of September 2010.

By Order of the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Judge Deborah A. Bail



# In the Supreme Court of the State of Idaho

JAMES M. SMITH, a single person

Plaintiff-Appellant,

v.

JOE CORLETT,

Defendant- Third Party Plaintiff-  
Respondent,

and

CATHY ROSERA,

Defendant-Respondent,

v.

ANTHONY C. D'ANGELO and JUDY  
D'ANGELO, husband and wife, and  
WHISTLER POINT, LLC, an Idaho limited  
liability company,

Third Party Defendants.

EXHIBIT

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ORDER RE: STAY

Supreme Court Docket No. 37060-2009

Ada County Docket No. 2008-9440

Ref. No. 10-545

An ORDER was issued by this Court on October 6, 2010, suspending proceedings in this appeal for fourteen (14) days for this Court to further review Appellant's MEMORANDUM RESPONDING TO APPLICATION TO VACATE IMPOSED BY THE DISTRICT COURT AND SUPPORTING APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS filed with this Court on June 30, 2010. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that the REQUEST FOR STAY be, and hereby is, DENIED as there is no posting of bond in district court or this Court.

ORDER RE: STAY – Docket No. 37060-2009

IT FURTHER IS ORDERED that the due date for Appellant's Brief is reset and Appellant's Brief shall be filed in this office on or before thirty-five (35) days from the date of this order.

DATED this 20<sup>th</sup> day of December 2010.

By Order of the Supreme Court

  
\_\_\_\_\_  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Judge Deborah Bail  
District Court Clerk

ORDER RE: STAY – Docket No. 37060-2009



# In the Supreme Court of the State of Idaho

JAMES M. SMITH, a single person

Plaintiff-Appellant,

v.

JOE CORLETT,

Defendant- Third Party Plaintiff-  
Respondent,

and

CATHY ROSERA,

Defendant-Respondent,

v.

ANTHONY C. D'ANGELO and JUDY  
D'ANGELO, husband and wife, and  
WHISTLER POINT, LLC, an Idaho limited  
liability company,

Third Party Defendants.

EXHIBIT

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ORDER DENYING APPLICATION FOR  
STAY

Supreme Court Docket No. 37060-2009  
Ada County District Court No. 2008-9440

Ref. No. 11-59

An APPLICATION OF JAMES M. SMITH FOR ORDER STAYING SHERIFF'S SALE SCHEDULED FOR FEBRUARY 10, 2011, a SECOND APPLICATION OF JAMES M. SMITH FOR ORDER STAYING ALL ATTEMPTS TO EXECUTE UPON THE JUDGMENT HEREIN BY LEVYING UPON THE PLAINTIFF'S RIGHTS IN THIS ACTION with attachments, a VERIFIED APPLICATION OF JAMES M. SMITH FOR WAIVER OF BOND ON GROUNDS OF INDIGENCE and a MEMORANDUM IN SUPPORT OF APPLICATIONS OF JAMES M. SMITH RE: FOR WAIVER OF BOND AND PARTIAL STAY OF EXECUTION were filed by counsel for Appellant on January 24, 2011. Thereafter, an OBJECTION TO APPLICATION FOR JAMES M. SMITH FOR ORDER STAYING SHERIFF'S SALE SCHEDULED FOR FEBRUARY 10, 2011 and OBJECTION TO SECOND APPLICATION OF JAMES M. SMITH FOR ORDER STAYING ALL ATTEMPTS TO EXECUTE UPON THE JUDGMENT HEREIN

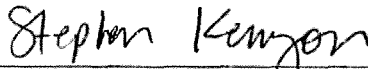
ORDER DENYING APPLICATION FOR STAY – Docket No. 37060-2009

BY LEVYING UPON THE PLAINTIFF'S RIGHTS IN THIS ACTION AND VERIFIED APPLICATION OF JAMES M. SMITH FOR WAIVER OF BOND ON GROUNDS OF INDIGENCE were filed by counsel for Respondents on January 28, 2011. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's APPLICATION FOR STAY be, and hereby is, DENIED.

DATED this 31 day of January 2011.

By Order of the Supreme Court

  
\_\_\_\_\_  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Judge Deborah Bail





TERRY C. COPPLE (ISB No. 1925)  
ALEXANDER P. MCLAUGHLIN (ISB No. 7977)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
Post Office Box 1583  
199 North Capitol Boulevard  
Suite 600  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[mclaughlin@davisoncopples.com](mailto:mclaughlin@davisoncopples.com)

Attorneys for Defendant Cathy Rosera  
and Defendant/Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

✓JAMES M. SMITH, a single person,	)	Case No. CV OC 0809440
	)	
Plaintiff,	)	
	)	
vs.	)	SECOND WRIT OF EXECUTION
	)	
CATHY ROSERA,	)	
	)	
Defendant,	)	
	)	
And	)	
	)	

SECOND WRIT OF EXECUTION - I



COPY

JOE CORLETT, a married person,	)
	)
Defendant, Third Party.	)
Plaintiff,	)
	)
vs.	)
	)
ANTHONY C. D'ANGELO and JUDY L.	)
D'ANGELO, husband and wife, and	)
WHISTLER POINT, LLC, an Idaho limited	)
liability company,	)
	)
Third-Party Defendants.	)
_____	)

THE PEOPLE OF THE STATE OF IDAHO:

TO THE SHERIFF OF ADA COUNTY, STATE OF IDAHO, GREETINGS:

WHEREAS, on the 15<sup>th</sup> day of January, 2010, the Defendants Cathy Rosera and Joe Corlett, above-named, recovered a Supplemental Summary Judgment For Taxation Of Costs And Determination Of Award Of Reasonable Attorney Fees in the above-entitled court against the Plaintiff James M. Smith, above-named, for the:

TOTAL SUM OF	\$36,392.04✓
Amount paid by Defendant or by execution:	<u>0.00</u>
Balance:	\$36,392.04
Plus accruing interest:	\$1,890.70
Plus accruing costs:	<u>2.00</u>
Amount now due and owing:	\$38,284.74 •

NOW, YOU, THE SAID SHERIFF, are hereby requested to satisfy said judgment, with interest at the rate as provided by law, plus accruing costs and Sheriff's fees, out of the personal property of said Plaintiff, or if sufficient personal property of said Plaintiff cannot be found, then out of the real property belonging to the said Plaintiff, and make return of this Writ within sixty (60) days after the receipt hereof, with what you have done endorsed thereon.

WITNESS, the Honorable Deborah A. Bail, District Judge of the said Fourth Judicial District of the State of Idaho, in and for the County of Ada, this \_\_\_\_ day of DEC 29 2010, 20\_\_.

J. DAVID NAVARRO, Clerk

By DARLENE BOYINK  
Deputy Clerk

SEAL



ADA COUNTY SHERIFF'S OFFICE  
CIVIL SECTION

**AFFIDAVIT OF SERVICE**

JAMES M SMITH  
PLAINTIFF

-VS-

(REVERSE JUDGMENT)

CATHY ROSERA; JOE CORLETT; ET AL  
DEFENDANT

ADA COUNTY - 4TH JUDICIAL DISTRICT  
COURT CASE NO: CVOC0809440  
SHERIFF'S CASE NO 1101299

SERVE TO: BRUCE BISTLINE, AGENT & ATTORNEY FOR PLAINTIFF,  
JAMES M. SMITH

ADDRESS: 623 WEST HAYS BOISE, ID 83702-5512

I, JARROD PIRNIE, CERTIFY THAT I PERSONALLY  
(DEPUTY'S PRINTED NAME)

**SERVED A COPY OF THE SECOND WRIT OF EXECUTION, SECOND  
NOTICE OF LEVY, SECOND NOTICE OF SHERIFF'S SALE, NOTICE, AND  
CLAIM OF EXEMPTION FORM**

TO: BRUCE BISTLINE  
(NAME OF INDIVIDUAL RECEIVING DOCUMENTS)

AT: 623 W. HAYS ST., BOISE  
(ADDRESS)

ON: 1-24-11 AT 0930  
(DATE) (TIME)

(SIGNATURE)

ADA#:

420

EXHIBIT

H

TERRY C. COPPLE (ISB No. 1925)  
ALEXANDER P. MCLAUGHLIN (ISB No. 7977)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
Post Office Box 1583  
199 North Capitol Boulevard  
Suite 600  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[mclaughlin@davisoncopples.com](mailto:mclaughlin@davisoncopples.com)

Attorneys for Defendant Cathy Rosera  
and Defendant/Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH, a single person,	)	Case No. CV OC 0809440
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CATHY ROSERA,	)	SECOND NOTICE OF LEVY
	)	
Defendant,	)	
	)	
And	)	
	)	
JOE CORLETT, a married person,	)	

SECOND NOTICE OF LEVY - I

ORIGINAL

	Defendant, Third Party.	)
	Plaintiff,	)
vs.		)
		)
	ANTHONY C. D'ANGELO and JUDY L.	)
	D'ANGELO, husband and wife, and	)
	WHISTLER POINT, LLC, an Idaho limited	)
	liability company,	)
		)
	Third-Party Defendants.	)
		)

---

\* \* \*

TO: JAMES M. SMITH, a single person:

YOU WILL PLEASE TAKE NOTICE that by virtue of an execution issued out of the District Court of the Fourth Judicial District for the County of Ada, State of Idaho, in the above-entitled action, Plaintiff James M. Smith, a single person, owes the sum of \$38,284.74, plus interest accruing thereon at the statutory rate, to Defendant Cathy Rosera and Defendant/Third-Party Plaintiff Joe Corlett. By virtue of that Supplemental Summary Judgment entered on January 15, 2010, in this action, I have this day levied upon the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of





TERRY C. COPPLE (ISB No. 1925)  
ALEXANDER P. MCLAUGHLIN (ISB No. 7977)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
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[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[mclaughlin@davisoncopples.com](mailto:mclaughlin@davisoncopples.com)

Attorneys for Defendant Cathy Rosera  
and Defendant/Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH, a single person,	)	Case No. CV OC 0809440
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CATHY ROSERA,	)	SECOND NOTICE OF SHERIFF'S SALE
	)	
Defendant,	)	
	)	
And	)	
	)	
JOE CORLETT, a married person,	)	

SECOND NOTICE OF SHERIFF'S SALE - I

COPY

	Defendant, Third-Party.	)
	Plaintiff,	)
vs.		)
		)
	ANTHONY C. D'ANGELO and JUDY L.	)
	D'ANGELO, husband and wife, and	)
	WHISTLER POINT, LLC, an Idaho limited	)
	liability company,	)
		)
	Third-Party Defendants.	)
		)

---

\*\*\*

Under and by virtue of a Supplemental Summary Judgment rendered out of the above-entitled Court, which was filed on the 15<sup>th</sup> day of January, 2010, and the Second Writ Of Execution being issued on the 29th day of December, 2010, in the above-entitled action, wherein the above-named Defendant Cathy Rosera and Defendant/Third-Party Plaintiff Joe Corlett obtained a Supplemental Summary Judgment against the above-named Plaintiff James M. Smith, a single person, for the sum of \$36,292.04, together with interest thereon at the rate of 5.625 percent per annum from January 15, 2010 through June 30, 2010, in the amount of \$931.26, and 5.375 percent from July 1, 2010 until December 27, 2010, in the amount of \$959.44, for a total sum of \$38,284.74, together with accruing interests and costs, all of which are to be satisfied out of the proceeds of the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-

Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy Rosera, Idaho Supreme Court Docket No. 37060-2009.

NOTICE IS HEREBY GIVEN, that on Thursday, the 10th day of February, 2011, at 10:00 o'clock ~~a.m.~~<sup>p.m.</sup> of said day at the steps of the Public Safety Building located at 7200 Barrister Drive, Boise, Idaho 83704, I will in obedience to said Order, and Second Writ Of Execution, I will levy on upon the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy

Rosera, Idaho Supreme Court Docket No. 37060-2009, to satisfy the above-mentioned Supplemental Summary Judgment, together with all interest thereon and costs of sale.

DATED this 24th day of January, 2011.

GARY RANEY, Sheriff  
Ada County, Idaho

By *Diane O'Quinn*  
Deputy Sheriff

TERRY C. COPPLE (ISB No. 1925)  
ALEXANDER P. MCLAUGHLIN (ISB No. 7977)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
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[mclaughlin@davisoncopples.com](mailto:mclaughlin@davisoncopples.com)

Attorneys for Defendant Cathy Rosera  
and Defendant/Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH, a single person,	)	Case No. CV OC 0809440
	)	
Plaintiff,	)	
	)	NOTICE
vs.	)	
	)	
CATHY ROSERA,	)	
Defendant,	)	
	)	
And	)	
	)	
JOE CORLETT, a married person,	)	
	)	

NOTICE - I

COPY

	Defendant, Third Party.	)
	Plaintiff,	)
vs.		)
		)
	ANTHONY C. D'ANGELO and JUDY L.	)
	D'ANGELO, husband and wife, and	)
	WHISTLER POINT, LLC, an Idaho limited	)
	liability company,	)
		)
	Third-Party Defendants.	)
		)

---

\* \* \*

TO: CATHY ROSERA and JOE CORLETT:

NOTICE is hereby given that the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy Rosera, Idaho Supreme Court Docket No. 37060-2009, has been levied against pursuant to the Second Writ Of Execution issued out of the District Court

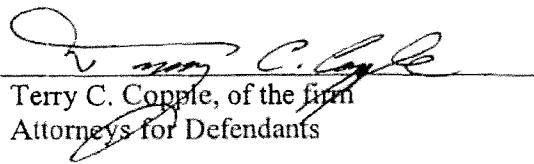
of the Fourth Judicial District for the County of Ada, State of Idaho on the \_\_\_\_ day of January, 2011.

This Notice is being provided pursuant to I.C. § 8-506(5) wherein it states, "Debits and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control, belonging to defendants, are attached in pursuance of such writ."

DATED this 3<sup>rd</sup> day of January, 2011.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: \_\_\_\_\_

  
Terry C. Copple, of the firm  
Attorneys for Defendants



TERRY C. COPPLE (ISB No. 1925)  
ALEXANDER P. MCLAUGHLIN (ISB No. 7977)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
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Facsimile: (208) 386-9428  
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mclaughlin@davisoncopples.com

Attorneys for Defendant Cathy Rosera  
and Defendant/Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

✓ JAMES M. SMITH, a single person,	)	Case No. CV OC 0809440
	)	
Plaintiff,	)	
	)	SECOND WRIT OF EXECUTION
vs.	)	
	)	
CATHY ROSERA,	)	
	)	
Defendant,	)	
	)	
And	)	
	)	

SECOND WRIT OF EXECUTION - 1

COPY

RB

JOE CORLETT, a married person,	)
	)
Defendant, Third Party.	)
Plaintiff,	)
	)
vs.	)
	)
ANTHONY C. D'ANGELO and JUDY L.	)
D'ANGELO, husband and wife, and	)
WHISTLER POINT, LLC, an Idaho limited	)
liability company,	)
	)
Third-Party Defendants.	)
_____	)

THE PEOPLE OF THE STATE OF IDAHO:

TO THE SHERIFF OF ADA COUNTY, STATE OF IDAHO, GREETINGS:

WHEREAS, on the 15<sup>th</sup> day of January, 2010, the Defendants Cathy Rosera and Joe Corlett, above-named, recovered a Supplemental Summary Judgment For Taxation Of Costs And Determination Of Award Of Reasonable Attorney Fees in the above-entitled court against the Plaintiff James M. Smith, above-named, for the:

TOTAL SUM OF	\$36,392.04 ✓
Amount paid by Defendant or by execution:	<u>0.00</u>
Balance:	\$36,392.04
Plus accruing interest:	\$1,890.70
Plus accruing costs:	<u>2.00</u>
Amount now due and owing:	\$38,284.74 ♦

NOW, YOU, THE SAID SHERIFF, are hereby requested to satisfy said judgment, with interest at the rate as provided by law, plus accruing costs and Sheriff's fees, out of the personal property of said Plaintiff, or if sufficient personal property of said Plaintiff cannot be found, then out of the real property belonging to the said Plaintiff, and make return of this Writ within sixty (60) days after the receipt hereof, with what you have done endorsed thereon.

WITNESS, the Honorable Deborah A. Bail, District Judge of the said Fourth Judicial District of the State of Idaho, in and for the County of Ada, this 29 day of December, 2010.

J. DAVID NAVARRO, Clerk

By Darlene Bayink  
Deputy Clerk



**Attorneys for Defendant Cathy Rosera  
and Defendant/Third-Party Plaintiff Joe Corlett**

COPY

	Defendant, Third-Party.	)
	Plaintiff,	)
vs.		)
		)
	ANTHONY C. D'ANGELO and JUDY L.	)
	D'ANGELO, husband and wife, and	)
	WHISTLER POINT, LLC, an Idaho limited	)
	liability company,	)
		)
	Third-Party Defendants.	)
<hr/>		)

\*\*\*

Under and by virtue of a Supplemental Summary Judgment rendered out of the above-entitled Court, which was filed on the 15<sup>th</sup> day of January, 2010, and the Second Writ Of Execution being issued on the 29<sup>th</sup> day of December, 2010, in the above-entitled action, wherein the above-named Defendant Cathy Rosera and Defendant/Third-Party Plaintiff Joe Corlett obtained a Supplemental Summary Judgment against the above-named Plaintiff James M. Smith, a single person, for the sum of \$36,292.04, together with interest thereon at the rate of 5.625 percent per annum from January 15, 2010 through June 30, 2010, in the amount of \$931.26, and 5.375 percent from July 1, 2010 until December 27, 2010, in the amount of \$959.44, for a total sum of \$38,284.74, together with accruing interests and costs, all of which are to be satisfied out of the proceeds of the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-

Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy Rosera, Idaho Supreme Court Docket No. 37060-2009.

NOTICE IS HEREBY GIVEN, that on Thursday, the 10th day of February, 2011, at 10:00 o'clock ~~a.m.~~ a.m. of said day at the steps of the Public Safety Building located at 7200 Barrister Drive, Boise, Idaho 83704, I will in obedience to said Order, and Second Writ Of Execution, I will levy on upon the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy

Rosera, Idaho Supreme Court Docket No. 37060-2009, to satisfy the above-mentioned  
Supplemental Summary Judgment, together with all interest thereon and costs of sale.

DATED this 24th day of January, 2011.

GARY RANEY, Sheriff  
Ada County, Idaho

By *Aiane Ohtori*  
Deputy Sheriff





ORIGINAL

	Defendant, Third Party.	)
	Plaintiff,	)
vs.		)
		)
	ANTHONY C. D'ANGELO and JUDY L.	)
	D'ANGELO, husband and wife, and	)
	WHISTLER POINT, LLC, an Idaho limited	)
	liability company,	)
		)
	Third-Party Defendants.	)
		)

---

\* \* \*

TO: JAMES M. SMITH, a single person:

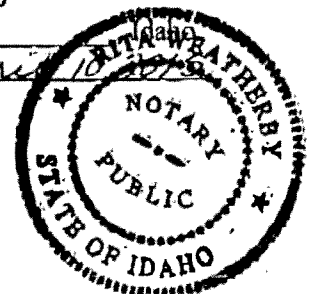
YOU WILL PLEASE TAKE NOTICE that by virtue of an execution issued out of the District Court of the Fourth Judicial District for the County of Ada, State of Idaho, in the above-entitled action, Plaintiff James M. Smith, a single person, owes the sum of \$38,284.74, plus interest accruing thereon at the statutory rate, to Defendant Cathy Rosera and Defendant/Third-Party Plaintiff Joe Corlett. By virtue of that Supplemental Summary Judgment entered on January 15, 2010, in this action, I have this day levied upon the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of

DATED this 24TH day of January, 2011.

By [Signature]  
Deputy Sheriff

On this 24TH day of January, in the year 2011, before me, RITA WEATHERBY, a Notary Public in and for said state, personally appeared Jarrod Pirnie, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same.

*John Weatherly*  
NOTARY PUBLIC FOR IDAHO  
Residing at *Ada County*  
My commission expires: *April 18, 1999*





COPY

	Defendant, Third Party,	)
	Plaintiff,	)
vs.		)
		)
ANTHONY C. D'ANGELO and JUDY L.		)
D'ANGELO, husband and wife, and		)
WHISTLER POINT, LLC, an Idaho limited		)
liability company,		)
		)
Third-Party Defendants.		)

---

\* \* \*

TO: CATHY ROSERA and JOE CORLETT:

NOTICE is hereby given that the claims, causes of action, choses in action, and all rights, title, and interest held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by James M. Smith in the matter known as James M. Smith, a single person, vs. Joe Corlett and Cathy Rosera, Idaho Supreme Court Docket No. 37060-2009, has been levied against pursuant to the Second Writ Of Execution issued out of the District Court

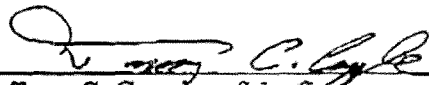
of the Fourth Judicial District for the County of Ada, State of Idaho on the \_\_\_\_ day of January, 2011.

This Notice is being provided pursuant to I.C. § 8-506(5) wherein it states, "Debits and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control, belonging to defendants, are attached in pursuance of such writ."

DATED this 3<sup>rd</sup> day of January, 2011.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: \_\_\_\_\_

  
Terry C. Copple, of the firm  
Attorneys for Defendants





IN THE DISTRICT COURT OF THE 4<sup>TH</sup> JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

**CERTIFICATE OF SALE ON PERSONAL PROPERTY SOLD UNDER  
SECOND WRIT OF EXECUTION**

Case # CVOC0809440

**JAMES M. SMITH, a single person,**  
Plaintiff,

(Reverse Judgment)

vs.

**CATHY ROSERA, & JOE CORLETT, a married person**  
Defendants.

Pursuant to the Second Writ of Execution issued out of the DISTRICT COURT OF THE  
4th JUDICIAL DISTRICT IN AND FOR THE COUNTY OF ADA duly attested the 24th day of  
January, 2011, I, GARY RANEY, Sheriff of Ada County, Idaho, do hereby certify that I levied  
upon, noticed for sale, and sold on the 10<sup>th</sup> day of February, 2011, to:

**CATHY ROSERA & JOE CORLETT  
C/O TERRY COPPLE ATTORNEY  
DAVISON, COPPLE, COPPLE, & COPPLE, LLP      POB 1583 BOISE, ID 83701**

the highest bidder, according to law, for the sum of \$500.00 (CREDIT BID)

THE CLAIMS, CAUSES OF ACTION, CHOSES IN ACTION, AND ALL RIGHTS, TITLE, AND INTEREST HELD BY PLAINTIFF JAMES  
M. SMITH IN THE LITIGATION OF JAMES M. SMITH, A SINGLE PERSON, VS. CATHY ROSERA, DEFENDANT, AND JOE CORLETT,  
A MARRIED PERSON, DEFENDANT/THIRD-PARTY PLAINTIFF, VS. ANTHONY C. D'ANGELO AND JUDY L. D'ANGELO, HUSBAND  
AND WIFE, AND WHISTLER POINT, LLC, AN IDAHO LIMITED LIABILITY COMPANY, THIRD-PARTY DEFENDANTS, CASE  
NUMBER CVOC0809440 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR  
THE COUNTY OF ADA, INCLUDING ANY INTEREST IN THE APPEAL OF THE FOREGOING LITIGATION, SPECIFICALLY, ANY AND  
ALL RIGHTS, TITLE, AND INTEREST HELD BY JAMES M. SMITH IN THE MATTER KNOWN AS JAMES M. SMITH, A SINGLE  
PERSON, VS JOE CORLETT AND CATHY ROSERA, IDAHO SUPREME COURT DOCKET NO. 37060-2009

And I do hereby sell, assign and transfer to the said purchaser above named, and successor  
and assigns, all the right, title and interest which the said judgment debtor had in said personal  
property at the time the attachment or execution was levied.

The Sheriff, by this Certificate of Sale, transfers the right and interest of the judgment debtor  
in and to the property above stated and gives possession, but does not guarantee clear title nor  
continued possessory rights to the purchaser.

IN WITNESS WHEREOF I have hereunto set my hand as Sheriff of Ada County,  
Idaho, this 10th day of February, 2011.

GARY RANEY  
Ada County Sheriff

By: *Alison Chantler*  
Deputy

I hereby certify this is a copy of the original Sheriff's Certificate of Sale.

EXHIBIT

## **EXHIBIT F**

# In the Supreme Court of the State of Idaho

JAMES M. SMITH, a single person

Plaintiff-Appellant,

v.

JOE CORLETT,

Defendant- Third Party Plaintiff-  
Respondent,

and

CATHY ROSERA,

Defendant-Respondent,

v.

ANTHONY C. D'ANGELO and JUDY  
D'ANGELO, husband and wife, and  
WHISTLER POINT, LLC, an Idaho limited  
liability company,

Third Party Defendants.

ORDER GRANTING MOTION TO  
DISMISS

Supreme Court Docket No. 37060-2009  
Ada County Docket No. 2008-9440

Ref. No. 11-98

1. A MOTION TO DISMISS THE APPEAL OF JAMES M. SMITH and an AFFIDAVIT OF TERRY C. COPPLE IN SUPPORT OF MOTION TO DISMISS THE APPEAL OF JAMES M. SMITH, with attachments, were filed by counsel for Respondents on February 11, 2011, requesting dismissal of this action for the reason that Appellant lacks standing because the foregoing sheriff's sale and purchase have rendered the issues herein moot.
2. An OBJECTION OF BRUCE S. BISTLINE TO MOTION TO DISMISS THE APPEAL OF JAMES M. SMITH and an AFFIDAVIT OF BRUCE S. BISTLINE IN SUPPORT OF OBJECTION OF BRUCE S. BISTLINE TO MOTION TO DISMISS THE APPEAL OF JAMES M. SMITH, with attachments, were filed by counsel for Appellant on February 14, 2011.

ORDER GRANTING MOTION TO DISMISS -- Docket No. 37060-2009

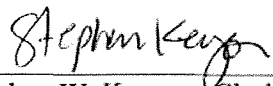
3. A REPLY OF RESPONDENTS JOE CORLETT AND CATHY ROSERA TO  
OBJECTION OF BRUCE S. BISTLINE was filed by counsel for Respondents on  
February 15, 2011.

The Court is fully advised; therefore, good cause appearing,

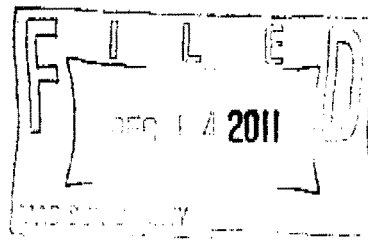
IT HEREBY IS ORDERED that Respondents' MOTION TO DISMISS THE APPEAL OF  
JAMES M. SMITH be, and hereby is, GRANTED and this appeal is DISMISSED.

DATED this 8<sup>th</sup> day of March 2011.

By Order of the Supreme Court

  
\_\_\_\_\_  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Court Reporter  
District Judge Deborah A. Bail



Thomas E. Dvorak (ID State Bar ID# 5043)  
Alexander P. McLaughlin (ID State Bar ID# 7977)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
13431821\_2 [10894-2]

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

AFFIDAVIT OF ALEXANDER P.  
MCLAUGHLIN IN SUPPORT OF  
PLAINTIFF'S SECOND MOTION  
CONTESTING PAL I, LLC'S CLAIM  
OF EXEMPTION

STATE OF IDAHO    )  
                              )ss  
County of Ada        )

ALEXANDER P. MCLAUGHLIN, being first duly sworn upon oath, deposes and states:

- 1.) I am one of the attorneys for the Plaintiff in the above-entitled action. Accordingly, I have personal knowledge of the facts herein and make this affidavit on the basis of such personal knowledge and belief.
- 2.) On or about January 3, 2011, this Court entered a money judgment in favor of Plaintiff KeyBank.
- 3.) Pal I, LLC ("Pal") appealed from the foregoing judgment.
- 4.) Thereafter, KeyBank attempted to levy and execute on Pal's appeal rights in this case.
- 5.) On June 13, 2011, Pal filed its Claim of Exemption, wherein Pal took the position that its appeal rights were not a cause of action on which levy was appropriate and, in fact, were exempt from execution under Idaho law.
- 6.) Attached hereto as Exhibit "A" and incorporated herein by this reference is a true, accurate, and complete copy of the Claim of Exemption filed by Pal on or about June 13, 2011.
- 7.) Pal eventually posted a bond pursuant to Rule 13 of the IDAHO APPELLATE RULES. This stayed KeyBank's execution efforts.
- 8.) On November 4, 2011, this Court entered its Judgment for Attorneys' Fees and Costs.
- 9.) The foregoing judgment is independent of the initial money judgment entered by this Court on January 3, 2011.

10.) The undersigned counsel inquired with Pal's attorneys if they would again be posting a bond to stay execution on the Judgment for Attorneys' Fees and Costs.

11.) Pal's counsel indicated that they would not.

12.) KeyBank initiated proceedings to again levy and execute on Pal's appeal rights/appeal in this case in the precise manner as it had attempted previously, requesting that the sheriff attach and levy upon PAL I, LLC's claim, cause of action, and appeal rights associated with this matter, Madison County District Court Case No. CV-2010-680, Idaho Supreme Court/Court of Appeals Docket No. 38645.

13.) On December 12, 2011, Pal filed another Claim of Exemption.

14.) Attached hereto as Exhibit "B" and incorporated herein by this reference is a true, accurate, and complete copy of the Claim of Exemption filed by Pal on or about December 12, 2011.

15.) Because almost new no substantive points are raised in the foregoing Claim of Exemption, the issues implicated in KeyBank's objection to the Claim of Exemption have already been decided by this Court in its Memorandum Decision on Post-Judgment Motions.

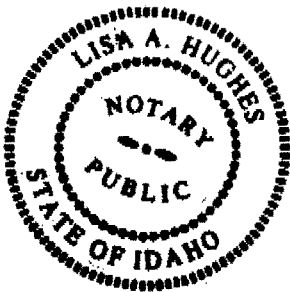
16.) Attached hereto as Exhibit "C" and incorporated herein by this reference is a true, accurate, and complete copy of this Court's previous Memorandum Decision on Post-Judgment Motions.



DATED this 13<sup>th</sup> day of December, 2011.

  
Alexander P. McLaughlin

SUBSCRIBED AND SWORN to before me this 13 day of December, 2011.



  
NOTARY PUBLIC FOR IDAHO

Residing at Boise, Idaho

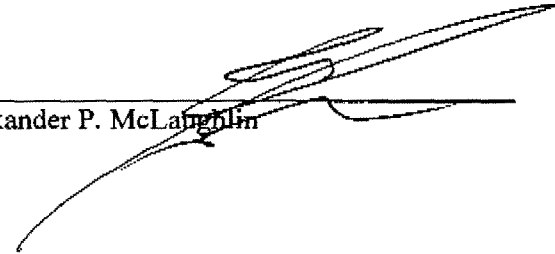
My commission expires: 3-22-2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13<sup>th</sup> day of December, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES,  
PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

- ☒ Via U.S. Mail  
☒ Via Hand-Delivery  
☐ Via Overnight Delivery  
☒ Via Facsimile 208-529-4166

  
Alexander P. McLaughlin

Bryan D. Smith, Esq. — ISBN 4411  
B. J. Driscoll, Esq. — ISBN 7010  
SMITH, DRISCOLL & ASSOCIATES, PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166

Attorneys for Defendant/Appellant  
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;  
BRIAN CHRISTENSEN, an Individual; L.A.  
PARKINSON, an Individual; BARNEY DAIRY,  
INC.; D.J. BARNEY, an Individual; WILLIAM  
DAVIS, an Individual; LOIS DAVIS, an  
Individual; DELL RAY BARNEY, an individual;  
and DELL J. BARNEY, an individual, dba  
Barney Towing & Recovery,

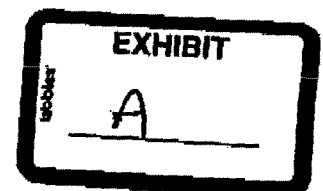
Defendants.

Case No. CV-2010-680

CLAIM OF EXEMPTION

1. I claim an exemption from levy for the following described money and/or property:
- a) Money, Including money in a bank account, which was paid to me or my family as:
- \_\_\_\_\_ Public assistance of any kind
  - \_\_\_\_\_ Social Security or SSI
  - \_\_\_\_\_ Worker's compensation
  - \_\_\_\_\_ Unemployment benefits
  - \_\_\_\_\_ Child Support
  - \_\_\_\_\_ Retirement, pension, or profit sharing benefits
  - \_\_\_\_\_ Military or veteran's benefits
  - \_\_\_\_\_ Life insurance or other insurance
  - \_\_\_\_\_ Disability, illness, medical or hospital benefits
  - \_\_\_\_\_ Alimony, support or maintenance
  - \_\_\_\_\_ Annuity contract benefits
  - \_\_\_\_\_ Bodily injury or wrongful death awards


CIVIL # \_\_\_\_\_  
2011 JUN 13 PM 4:26  
CLERK OF DISTRICT COURT  
IDAHO



Other money (describe) \_\_\_\_\_  
 Wages (Do not check this box until you have first talked to your employer to see if he/she correctly calculated your exemption according to the formula under Item 28 on the form entitled "SOME EXEMPTIONS TO WHICH YOU MAY BE ENTITLED." Then check this box only if you believe your employer's calculation is incorrect.

b) Property.

Professional books \_\_\_\_\_  
 Burial plots \_\_\_\_\_  
 Health aids \_\_\_\_\_  
 Homestead, house, mobile home and related structures \_\_\_\_\_  
 Jewelry \_\_\_\_\_  
 Car, truck or motorcycle \_\_\_\_\_  
 Tools and implements \_\_\_\_\_  
 Appliances, furnishings, firearms, animals, musical instruments, books, clothes, family portraits and heirlooms \_\_\_\_\_  
☒ Other property (describe) Defendant PAL I, LLC ("PAL") objects to the Plaintiff's purported execution by levy and attachment on the grounds that the exact property that the Plaintiff has attempted to levy upon is unclear from its writ and notice. Further, PAL claims that "all debts and credits owing to [it]... including but not limited to [its] claim, cause of action and appeal in this matter" purportedly levied upon by the Bonneville County Sheriff are exempt from levy by execution on the following grounds: (1) PAL's right to appeal the judgment entered in this case in favor of Plaintiff is not subject to execution to satisfy that same judgment from which PAL appeals; (2) Plaintiff's execution has violated Idaho Code Sections 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301; and (3) Plaintiff violated Idaho Rule of Civil Procedure 5.

  
 B. Driscoll, Esq.  
 Attorney for Defendant, PAL I, LLC

P.O. Box 50731 \_\_\_\_\_  
 Address

Idaho Falls, ID 83405 \_\_\_\_\_  
 City, State Zip

208-524-0731 \_\_\_\_\_  
 Phone Number

Return to: Bonneville Sheriff, 605 N. Capital Ave., Idaho Falls, ID 83402

Bryan D. Smith, Esq. — ISBN 4411  
 B. J. Driscoll, Esq. — ISBN 7010  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
 414 Shoup Ave.  
 P.O. Box 50731  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 524-0731  
 Facsimile: (208) 529-4166

Attorneys for Defendant/Appellant  
 PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
 national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;  
 BRIAN CHRISTENSEN, an individual; LA.  
 PARKINSON, an individual; BARNEY DAIRY,  
 INC.; D.J. BARNEY, an individual; WILLIAM  
 DAVIS, an individual; LOIS DAVIS, an  
 individual; DELL RAY BARNEY, an individual;  
 and DELL J. BARNEY, an individual, dba  
 Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

**CLAIM OF EXEMPTION**

BONNEVILLE COUNTY  
 SHERIFF'S DEPT.  
 IDAHO FALLS, IDAHO  
 RECEIVED

11 DEC 12 P 4:10

CIVIL # \_\_\_\_\_  
 WARRANT # \_\_\_\_\_

1. I claim an exemption from levy for the following described money and/or property:
- a) Money, Including money in a bank account, which was paid to me or my family as:
    - \_\_\_\_\_ Public assistance of any kind
    - \_\_\_\_\_ Social Security or SSI
    - \_\_\_\_\_ Worker's compensation
    - \_\_\_\_\_ Unemployment benefits
    - \_\_\_\_\_ Child Support
    - \_\_\_\_\_ Retirement, pension, or profit sharing benefits
    - \_\_\_\_\_ Military or veteran's benefits
    - \_\_\_\_\_ Life Insurance or other insurance
    - \_\_\_\_\_ Disability, illness, medical or hospital benefits
    - \_\_\_\_\_ Alimony, support or maintenance
    - \_\_\_\_\_ Annuity contract benefits
    - \_\_\_\_\_ Bodily Injury or wrongful death awards



Other money (describe) \_\_\_\_\_

Wages (Do not check this box until you have first talked to your employer to see if he/she correctly calculated your exemption according to the formula under Item 28 on the form entitled "SOME EXEMPTIONS TO WHICH YOU MAY BE ENTITLED." Then check this box only if you believe your employer's calculation is incorrect.

b) Property,

Professional books

Burial plots

Health aids

Homestead, house, mobile home and related structures

Jewelry

Car, truck or motorcycle

Tools and implements

Appliances, furnishings, firearms, animals, musical instruments, books, clothes, family portraits and heirlooms

Other property (describe) Defendant PALI, LLC ("PAL") objects to the Plaintiff's purported execution by levy and attachment on the grounds that the exact property that the Plaintiff has attempted to levy upon is unclear from its writ and notice. Further, PAL claims that "all debts and credits owing to [it] ... including but not limited to [its] claim, cause of action and appeal rights associated with this matter," purportedly levied upon by the Bonneville County Sheriff are exempt from levy by execution on the following grounds: (1) PAL's right to appeal the judgment entered in this case in favor of Plaintiff is not subject to execution to satisfy that same judgment from which PAL appeals; (2) Plaintiff's execution has violated Idaho Code Sections 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301; and (3) Plaintiff violated Idaho Rule of Civil Procedure 5. In addition, PAL has filed a motion for stay of execution, which the court should grant under the authority of Idaho Appellate Rules 13(b) and 16, Idaho Rule of Civil Procedure 54(a)(5), and BECO Const. Co., Inc. v. J-U-B Engineers Inc., 149 Idaho 294, 299 n.3 (2010).

B. J. Driscoll, Esq.

Attorney for Defendant, PALI, LLC

P.O. Box 50731

Address

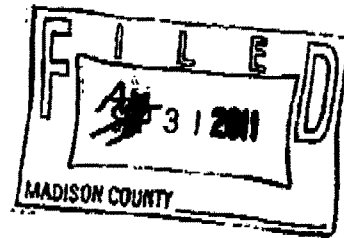
Idaho Falls, ID 83405

City, State Zip

208-524-0731

Phone Number

Return to: Bonneville Sheriff, 605 N. Capital Ave., Idaho Falls, ID 83402



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR MADISON COUNTY**

**KEYBANK NATIONAL ASSOCIATION,**  
a national banking association,

Plaintiff,

v.

**PAL I, LLC, an Idaho limited liability  
Company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an  
individual; BARNEY DAIRY, INC.;  
D.J. BARNEY, an individual; WILLIAM  
DAVIS, an individual; LOIS DAVIS, an  
individual; DELL RAY BARNEY,  
an individual; and DELL J. BARNEY,  
an individual, dba Barney Towing &  
Recovery,**

Defendants.

Case No. CV-10-680

**MEMORANDUM DECISION  
ON POST-JUDGMENT MOTIONS**

**I. PROCEDURAL HISTORY**

On December 23, 2010, the Court granted Plaintiff KeyBank National Association's ("KeyBank") motion for summary judgment and denied Defendant PAL I, LLC's ("PAL") cross motion for summary judgment.<sup>1</sup> The Court then entered a judgment in KeyBank's favor for \$16,884.41.<sup>2</sup> After the Court later denied PAL's motion for reconsideration, PAL filed its appeal on March 16, 2011.<sup>3</sup>

PAL advised KeyBank by e-mail on March 23, 2011 that it "would not be posting any surety bond or security to stay execution at this time."<sup>4</sup> Thereafter, on or about May 19,

<sup>1</sup> *Memorandum Decision* (December 23, 2010).

<sup>2</sup> *Judgment* (January 3, 2011).

<sup>3</sup> *Memorandum Decision on Reconsideration* (February 25, 2011) and *Notice of Appeal* (March 17, 2011).

<sup>4</sup> *Affidavit of Alexander P. McLaughlin in Support of Motion Contesting PAL I, LLC's Claim of Exemption*, Exhibit "B" (June 20, 2011).



2011, KeyBank delivered a writ of execution to the Bonneville County Sheriff, which directed him to:

[S]atisfy [the] judgment . . . out of the personal property of [PAL], including but not limited to equipment, inventory, accounts receivable, chattel paper, instruments, negotiable documents of title, general intangibles, and any other property . . .<sup>5</sup>

The letter of instructions specifically directed the sheriff to attach and levy upon the following property:

[A]ll goods, chattels, moneys and other property, both real and personal, . . . the debts and credits and other personal property not capable of manual delivery, specifically including but not limited to Defendant PAL I, LLC's claim, cause of action, and appeal rights associated with the matter, Madison County District Court Case No. CV-2010-690, Idaho Supreme Court/Court of Appeals Docket No. 38645, . . .

KeyBank served the writ of attachment on PAL's registered agent on June 2, 2011.

Rather than posting a surety bond pursuant to I.A.R. 13(b)(15), PAL opted to file a claim of exemption pursuant to I.C. § 11-203. PAL's claim of exemption asserts numerous deficiencies in the attempted execution. These defects are summarized as follows:

1. The precise property KeyBank has attempted to levy upon is unclear.
2. The property purported to be levied upon is exempt because:
  - A. PAL's right to appeal is not a chose in action subject to execution;
  - B. KeyBank's attempted execution violated I.C. §§ 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301; and
  - C. KeyBank's attempted execution violated Rule 5, I.R.C.P.<sup>7</sup>

There are now two motions pending before the Court: (1) KeyBank's *Motion Contesting PAL I, LLC's Claim of Exemption*, filed June 20, 2011, and (2) PAL's *Motion to Set Aside Judgment, Motion to Consolidate, and Motion to Discharge Attachment*, filed June 24, 2011. By stipulation of counsel, the parties scheduled these matters for a hearing in Jefferson County on July 18, 2011. Following oral argument the Court took these matters under advisement.

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<sup>5</sup> *Id.*, Exhibit "D."

<sup>6</sup> *Id.*, Exhibit "C" (emphasis in original).

<sup>7</sup> *Id.*, Exhibit "A."

## II. DISCUSSION

### A. PAL's Claim of Exemption is Denied because the Right to Appeal the Judgment Rendered in this Matter is a "Thing in Action."

Both parties concede that Idaho Code § 11-301 permits a sheriff to execute upon "things in action." In *Karle v. Visser*, 141 Idaho 804, 807, 118 P.3d 136, 139 (2005), the Idaho Supreme Court cited with approval a decision from the U.S. Bankruptcy Court for the District of Idaho equating a pending lawsuit with a "thing in action." See also *In re Wiersman*, 283 B.R. 294, 300 (D.Id.2002); and *Mulr v. City of Pocatello*, 36 Idaho 532, 212 P. 345 (1922). However, PAL argues that because the right to appeal is different from a lawsuit, it should be exempt from execution. The resolution of this issue depends on whether the right to appeal constitutes a "thing in action" under I.C. § 11-301. There are no recorded decisions of the Idaho appellate courts addressing this precise issue.

KeyBank relies heavily upon the recent unpublished ruling of the Idaho Supreme Court in *Smith v. Corlett*, S.Ct. Docket No. 37060-2009. In *Smith*, the prevailing defendant, Rosera, was awarded a \$36,392.04 judgment against Smith for attorney fees and costs by the District Court. When Smith refused to pay, Rosera attempted to execute upon Smith's underlying cause of action against Rosera. Smith objected and the District Court stayed execution. Rosera appealed and filed an application to vacate the stay with the Supreme Court. The Supreme Court vacated the stay and allowed Rosera to satisfy her judgment by levying on Smith's underlying cause of action and the right to appeal the award of costs and attorney fees. Once Rosera purchased these rights at the sheriff's sale, the Supreme Court granted her motion to dismiss the appeal.<sup>8</sup> KeyBank concedes that because this is an unreported decision, it is not binding on the Court. However, it provides significant insight into how the Idaho Supreme Court views such matters.

KeyBank also cites several cases from other jurisdictions which treat the right to sue as a "thing in action." However, only *RMA Ventures California v. Sun America Life Ins. Co.*, 576 F.3d 1070 (10<sup>th</sup> Cir. 2009), deals specifically with the right to appeal. In *RMA*, the Tenth Circuit Court of Appeals confronted a similar issue under Utah law and unanimously upheld a defendant's purchase of a plaintiff's lawsuit and appeal rights at a public execution sale. Like in *Smith*, the Tenth Circuit permitted the defendant to dismiss the appeal. It should be

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<sup>8</sup> *Id.*, Exhibits "E" and "F."



noted that Utah's levy and execution rules, set forth in Utah R.Civ.P. 65(f), allow execution against "choses in action," which is almost identical to Idaho's language allowing execution against "things in action" in I.C. § 11-310.<sup>9</sup>

PAL responds by noting that neither *RMV* nor *Smith* involved the levy and sale of the appeal rights of a defendant against whom a judgment had been entered based on the plaintiff's underlying complaint. In *RMV*, the defendant obtained a judgment for attorney fees. The plaintiff did not appeal the attorney fees award, but did appeal the granting of summary judgment to the defendant. The Tenth Circuit permitted defendant to execute upon the right to appeal the adverse summary judgment ruling—not the attorney fees award. In other words, it was the plaintiff's underlying lawsuit or chose in action against the defendant that was subject to execution. Similarly, PAL argues that *Smith* only concerned an execution by Rosera against Smith's original complaint, not the later award of attorney fees. PAL also argues that by definition, a chose in action cannot include a defendant's right to appeal an adverse judgment in the underlying case. Citing BLACK'S LAW DICTIONARY (6<sup>th</sup> ed. 1990), PAL notes that a chose in action is a right to prosecute a lawsuit or legal claim, not the right to defend against a lawsuit or claim. PAL argues persuasively that the right to defend is very different from a counterclaim.

The Court generally agrees with PAL's analysis, but concludes that it is inapplicable to the facts of this case. For example, if an attorney sues an impoverished client on an overdue account, and the trial court erroneously grants the attorney a judgment, could the attorney prevent a reversal on appeal by levying against the client's right to appeal the judgment? Such an outcome would raise serious public policy concerns.<sup>10</sup> However, the Court notes that the facts in this matter are clearly distinguishable from such a scenario.

In the case at hand, the underlying lawsuit concerned KeyBank's complaint for a declaratory judgment quieting title to personal property originally possessed by its judgment debtor, Tri-steel. KeyBank had perfected a secured interest in the property. PAL came into possession of the disputed property by virtue of a later judgment against Tri-steel and sold

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<sup>9</sup> KeyBank also cites *Citizens Nat. Bank v. Dixieland Forest Products, LLC*, 935 So.2d 1004 (Miss., 2006), and *Archie Mineral Feed Co., Inc. v. Farm Bureau Mut. Ins. Co.*, 462 N.W.2d 677 (Iowa 1990). Although both cases support the position the choses in action are subject to execution when permitted by statute, neither decision appears to directly address the question of whether an appeal is a chose in action.

<sup>10</sup> While this hypothetical might illustrate an appropriate exception to the general rule that an appeal is a thing in action, that issue is not currently before the Court.

the property at a sheriff's sale. KeyBank sought recovery of the sale proceeds retained by PAL, claiming that PAL wrongfully levied against and sold the property in violation of its perfected secured interest.<sup>11</sup> The Court granted summary judgment in KeyBank's favor and awarded them a judgment against PAL for \$16,884.41. After learning that PAL did not intend to post an appeal bond, KeyBank attempted to satisfy their judgment by executing against PAL's appeal rights and "the personal property of [PAL], including but not limited to equipment, . . . chattel paper, instruments, negotiable documents of title, general intangibles, and any other property . . ."<sup>12</sup> In other words, the execution attempted by KeyBank was not only against PAL's right to pursue its appeal, but it was also executing against PAL's underlying claim of ownership to the disputed collateral. It is worth remembering that the sheriff was directed to collect a variety of items for sale:

[A]ll goods, chattels, moneys and other property, both real and personal, . . . the debts and credits and other personal property not capable of manual delivery, specifically *including but not limited to Defendant PAL I, LLC's claim, cause of action, and appeal rights* associated with the matter, Madison County District Court Case No. CV-2010-680, Idaho Supreme Court/Court of Appeals Docket No. 38645, . . .<sup>13</sup>

The attempted execution included not only PAL's appeal rights, but it also encompassed PAL's "claim" to the moneys, instruments, documents of title, and things in actions associated with the disputed proceeds.

If KeyBank had merely obtained a money judgment on an open account for services rendered, perhaps PAL's argument would be more persuasive. However, this is clearly not a collection case. Here, KeyBank is also seeking to directly levy upon the disputed proceeds now in PAL's possession. PAL's right to appeal the judgment is inextricably connected to its attempt to retain control and possession of the disputed proceeds. In other words, but for its appeal, PAL would have no colorable claim to retaining the proceeds from its improper sale of KeyBank's collateral. KeyBank is merely attempting to levy on PAL's underlying claim that it is the proper owner of property claimed by, and awarded to, KeyBank. If the Sheriff appropriately carried out the execution, KeyBank would not only hold PAL's appeal rights, it would also hold the underlying right, title, and claim to the disputed proceeds.

<sup>11</sup> See *Complaint for Quiet Title of Alternatively for Creditor's Bill*, Exhibit "B" (August 16, 2010).

<sup>12</sup> *Aff. of McLoughlin*, Exhibit "D" (emphasis added).

<sup>13</sup> *Id.*, Exhibit "C" (emphasis modified from the original).

For these reasons, the Court concludes that PAL's right to appeal the judgment in this case, along with its right to assert ownership in the proceeds of the disputed collateral, are things in actions within the meaning of I.C. § 11-310. The Court notes that this ruling does not leave PAL without legal remedies. PAL may still post a bond or, in the alternative, bid on the personal property at the sheriff's sale in order to preserve its right to seek validation of its legal theories.

**B. The Motion to Discharge the Attachment is Denied.**

PAL also generally attacks KeyBank's attempted levy by asserting that the writ of execution was "improperly or irregularly issued" and should, therefore, be discharged. See I.C. § 8-534. It specifically alleges that KeyBank failed to serve a copy of the application for a writ of execution, or the writ itself, upon PAL pursuant to L.R.C.P. 5. PAL also claims that it did not receive a notice of exemption form, instructions for debtors asserting a claim of exemption, or the form for claiming exemptions. PAL's attorney asserts that the Bonneville County Sheriff failed to serve these documents on the agent.<sup>14</sup> It alleges that these irregularities violate I.C. §§ 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301.

KeyBank notes, without conceding any irregularity, that PAL essentially waived any objections by timely filing a claim of exemption in this matter. KeyBank also submitted the Affidavit of Keith Christensen, Deputy Sheriff for Bonneville County, in which he testifies that he served a claim of exemption form on PAL's registered agent, but did not send a copy to its attorney because nothing was actually seized.<sup>15</sup>

Although a showing of prejudice is not expressly required under I.C. § 8-534, the Court notes that whatever perceived irregularities are alleged, there appears to be no demonstrated prejudice to PAL. PAL filed a timely claim of exemption and all collection efforts were effectively stayed. No property has been sold and PAL has been afforded a full opportunity to have its objections heard. Any deficiency in PAL's claim of exemption is solely attributable to its failure to assert a legally viable basis for an exemption (see Section II(A), *supra*), not the time within which it was filed.

<sup>14</sup> Affidavit of B.J. Driscoll, ¶¶ 2-3 (June 24, 2011).

<sup>15</sup> Affidavit of Keith Christensen, ¶¶ 2, 4-6 (July 12, 2011).

Based on the record before it, the Court finds insufficient evidence to contradict Deputy Christensen's affidavit.<sup>16</sup> It appears that the documents served on the agent substantially complied with I.C. § 8-507C. Additionally, PAL's reading of I.C. § 8-534 is inconsistent with the Supreme Court's holding in *McCluskey v. Galland*, 95 Idaho 472, 511 P.2d 289 (1973) ("It is the general rule that any objection to the irregularities of an attachment proceeding must be made before the entry of judgment"). Finally, the Court concludes that there is no merit to PAL's objections based on I.R.C.P 5. This rule only applies to specific "pleadings," which does not include the execution documents and forms involved here. Therefore, the Court finds no irregularity sufficient to invalidate the attempted execution and concludes that PAL's objections to the manner and form of service should be denied.

**C. PAL's Motion to Set Aside Judgment is Denied.**

PAL urges the Court to set aside its earlier decisions pursuant to Rule 60(b)(2), (5), and (6). This rule provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

...  
(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

...  
(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

PAL contends that the filing of a new lawsuit against them by Zions First National Bank (Madison County Case No. CV-2011-367) constitutes newly discovered evidence under Rule 60(b)(2). Additionally, they claim this new case makes prospective application of the Court's judgment inequitable under Rule 60(b)(5) because the new action concerns a

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<sup>16</sup> Curiously, there is no affidavit from the registered agent confirming PAL's alleged failure to properly serve him. The *Aff. of Driscoll* only contains a brief assertion, based on hearsay, that the registered agent told him he was not fully served.

competing claim to the proceeds from the same property. In order to rule upon this motion and the motion to consolidate, the Court takes judicial notice of the contents of the file in Madison County Case No. CV-2011-367 pursuant to I.R.E. 201.

Zions Bank's secured interest in the disputed property was a matter of public record and clearly known to PAL prior to the entry of judgment. The new lawsuit should not have surprised PAL and its potential impact on this case was clearly foreseeable. This evidence does not qualify as "information in existence at the time of trial but not discoverable with due diligence." *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 245, 869 P.2d 554, 562 (1993). To the extent that PAL is arguing that the lawsuit itself is new, even if the claimed security interest was known, it is undisputed that the new lawsuit was filed on May 18, 2011, well after this Court had already entered judgment. Facts that occur after a trial do not constitute "newly discovered evidence." *In re Jane Doe, I*, 145 Idaho 650, 652, 182 P.3d 707, 709 (2008). While there was no trial in this case, a judgment had been rendered.

PAL's concern that the Zions Bank's case creates an unacceptable risk of an inequitable result is also misplaced. Rule 60(b)(5) requires PAL to prove that the Court's prior rulings were prospective and no longer equitable. Here, the Court awarded a money judgment to KeyBank. PAL has presented no authority that such a judgment is "prospective." Even if it was prospective, PAL must still prove that the outcome would be "inequitable." The Court notes that PAL could have attempted to join Zions Bank in this case earlier, but declined to do so. As will be discussed more fully below, it is now too late to do so. However, there is nothing stopping PAL from joining KeyBank to the new case in order to avoid the risk of double liability. The Court is confident in the attorneys' ability to assist it in avoiding an inequitable outcome in the new case.

PAL also seeks relief under Rule 60(b)(6), claiming there are "other reason[s] justifying relief from the operation of the judgment." The Court notes that PAL essentially is inviting it to reconsider its prior rulings one more time. It is now argues, in essence, that the filing of the new Zions Bank case somehow exposes the "reversible error" in the Court's reasoning.<sup>17</sup> However, assuming there is a high degree of similarity in the two cases, as suggested by PAL in their briefing, there is no reason to believe the Court's key rulings

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<sup>17</sup> *Brief in Support of PAL's Motions and in Opposition to KeyBank's Motion Contesting PAL I, LLC's Claim of Exemption*, p. 4 (June 24, 2011).

would have been any different had Zions Bank been joined to this case. If Zions Bank's claims are truly identical to KeyBank's, perhaps the only difference would have been the necessity of adjudicating the relative priorities of Key Bank and Zions Bank to the proceeds. As noted by the Idaho Supreme Court, Rule 60(b) motions should not be used as a substitute for an appeal. *Johnston v. Pascoe*, 100 Idaho 414, 420, 599 P.2d 985, 991 (1979). Therefore, the Court respectfully declines to revisit its prior rulings or set aside its judgment.

**D. PAL's Motion to Consolidate is Denied.**

PAL also argues that because the new Zions Bank lawsuit shares common questions of law and fact with the present case, the cases should be consolidated pursuant to Rule 42(a). Idaho Rule of Civil Procedure 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it *may* order a joint hearing or trial of any or all the matters in issue in the actions; it *may* order all the actions consolidated; and it *may* make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(Emphasis added). Of course, the use of "may" throughout Rule 42(a) indicates that this is a discretionary matter for the Court. *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 365 P.2d 958 (1961).

This case has already been adjudicated to a final judgment, which PAL has appealed. Idaho Appellate Rule 13 permits a district court to rule upon certain motions while an appeal is pending. The lengthy list provided Rule 13 does not include a motion to consolidate. There are sound reasons for this exclusion. If a district court were to grant such a motion, it would effectively expand the scope of an appeal already before the Supreme Court. Such a decision is beyond the discretion of this court, and belongs to the tribunal before which the appeal is pending.

Even if the Court had the authority to consolidate the cases at this late stage of the proceedings, it would decline to do so. Frankly, this type of last minute brinkmanship is not conducive to the just and timely resolution of cases. The Court sees no reason why it cannot reach a fair and consistent result in the second case that avoids double liability against PAL. Again, this is a concern PAL could have addressed earlier by joining Zions Bank in this case, but it made the tactical choice not to do so. While the Court may understand PAL's reasons,

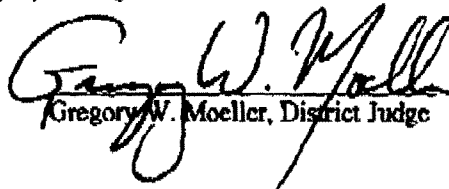
all tactical choices have consequences. If PAL believes it is unjust to proceed on the Zions Bank case while its appeal in this case is pending, there are procedural options available to ensure a consistent result.

### III. CONCLUSION

The Court has once again been asked by the parties to rule upon esoteric questions of collection law with a scarcity of controlling legal precedent. Nevertheless, the Court has attempted to rule upon these questions through consideration of relevant appellate court decisions, reliance upon analogous legal principles and holdings, and the application of common sense. Based upon the analysis set forth herein, the Court hereby rules as follows:

1. KeyBank's *Motion Contesting PAL I, LLC's Claim of Exemption* is GRANTED.
2. PAL's *Motion to Set Aside Judgment, Motion to Consolidate, and Motion to Discharge Attachment* are all DENIED.
3. KeyBank is hereby authorized to proceed with levy and sale on its judgment as provided by law.

SO ORDERED this 31<sup>st</sup> day of August, 2011.

  
Gregory W. Moeller, District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Memorandum Decision on Reconsideration was, on this 31<sup>st</sup> day of August, 2011, served upon the following individuals via U.S. Mail, postage prepaid:

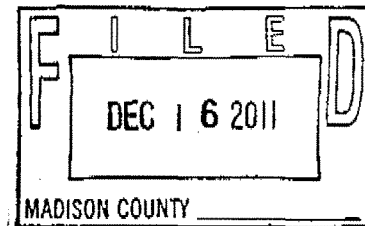
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Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

MEMORANDUM IN SUPPORT OF  
MOTION TO RECONSIDER ORDER  
STAYING EXECUTION

COMES NOW Plaintiff KeyBank National Association ("KeyBank" or "Plaintiff"), by and through its counsel of record, Givens Pursley LLP, and hereby submits this Memorandum in Support of Motion to Reconsider Order Staying Execution.

### I. INTRODUCTION

KeyBank's Motion to Reconsider should be granted for two reasons. First, there is no legal basis to stay execution of this Court's Judgment for Attorneys' Fees and Costs. Rule 13(b)(15) requires that a party seeking to stay execution of a judgment on appeal post a bond in the amount of the judgment, plus 36%. Pal I, LLC ("Pal") posted a bond to stay execution of this Court's January 3, 2011, Judgment, but not this Court's November 3, 2011, Judgment for Attorneys' Fees and Costs.

Second, Pal's reliance on *Beco Construction Company, Inc., v. J-U-B Engineers Inc.*, 149 Idaho 294, 233 P.3d 1216, fn. 1 (2010) is misplaced. Even the most cursory analysis of the genealogy of Rule 16(a) of the IDAHO APPELLATE RULES ("IAR") and its predecessor statute indicates that the intent of IAR 16(a)'s drafters was solely to eliminate Idaho's outdated requirement that a party perfect an appeal by filing a "cost bond." Compare I.C. § 13-202 ("The appeal is ineffectual for any purpose unless prior to or at the time of filing the notice of appeal or within five (5) days thereafter, an undertaking be filed, or a deposit of money be made with the clerk"); with IAR 16(b) ("No undertaking on appeal for costs shall be required").

As expressly stated by our Idaho Supreme Court at the time IAR 16(a) was passed, "[D]uring the pendency of this appeal I.C. § 13-203 was repealed and I.A.R. 16(a) adopted, which expressly eliminates the requirements of posting a cost bond on appeal." *Erickson v.*

*Amouth*, 99 Idaho 907, 908, 591 P.2d 1074, 1075 (1979). For the reasons set forth herein, KeyBank respectfully requests that this Court GRANT KeyBank's Motion to Reconsider.

## II. STATEMENT OF FACTS

1.) On or about January 3, 2011, this Court entered its Judgment against Pal in the original amount of \$16,884.41. Pal appealed and did not post a supersedeas bond.<sup>1</sup>

2.) Thereafter, KeyBank attempted to satisfy the judgment by levying and executing on Pal's appeal rights in this case.<sup>2</sup>

3.) On June 13, 2011, Pal filed its Claim of Exemption, wherein Pal took the position that its appeal rights were not a cause of action on which levy was appropriate and, in fact, were exempt from execution under Idaho law.<sup>3</sup>

4.) On August 31, 2011, the Court issued its Memorandum Decision on Post-Judgment Motions. Pal's arguments were squarely rejected. Accordingly, KeyBank reinitiated its levy and execution efforts.<sup>4</sup>

5.) In lieu of posting an actual bond, Pal set up a restricted disbursement account in the amount that had to be posted under IAR 13(b)(15). Pal also filed a Motion to Stay Execution and KeyBank objected.<sup>5</sup>

6.) On September 16, 2011, this Court again found in favor of KeyBank and issued its Order Denying Motion for Stay of Execution.<sup>6</sup>

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<sup>1</sup> Affidavit of Alexander P. McLaughlin in Support of Motion to Reconsider Order Staying Execution ("McLaughlin Affidavit"), P. 2.

<sup>2</sup> McLaughlin Affidavit, P. 2.

<sup>3</sup> McLaughlin Affidavit, P. 2.

<sup>4</sup> McLaughlin Affidavit, P. 2.

<sup>5</sup> McLaughlin Affidavit, P. 2.

7.) Pal eventually posted its bond and filed a Motion for Stay of Execution and Notification of Cash Deposit. In response, KeyBank filed its notice of non-opposition.<sup>7</sup>

8.) To date, the Court has not issued an order on Pal's second Motion for Stay of Execution.<sup>8</sup>

9.) On or about November 3, 2011, this Court issued its Judgment for Attorneys' Fees and Costs in the amount of \$7,004.83.<sup>9</sup>

10.) The Court's November 3, 2011, judgment is independent of the Court's initial January 3, 2011, Judgment. So much is stated in the body of the Judgment for Attorneys' Fees and Costs, wherein it is noted that the latter judgment was entered "in addition to the Judgment previously entered." Judgment for Attorneys' Fees and Costs, P. 2 (emphasis added).<sup>10</sup>

11.) Because a new judgment was issued that was separate from the January 3, 2011, judgment, KeyBank initiated new proceedings to execute on Pal's appeal rights.<sup>11</sup>

12.) In response, Pal filed yet another Claim of Exemption (on the same grounds as the previous claim of exemption, which were denied) and a third Motion for Stay of Execution.<sup>12</sup>

13.) KeyBank followed with its Second Motion Contesting Pal I, LLC's Claim of Exemption and a proposed order allowing KeyBank to proceed with levy and execution on Pal's appeal.<sup>13</sup>

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<sup>6</sup> McLaughlin Affidavit, P. 3.

<sup>7</sup> McLaughlin Affidavit, P. 3.

<sup>8</sup> McLaughlin Affidavit, P. 3.

<sup>9</sup> McLaughlin Affidavit, P. 3.

<sup>10</sup> McLaughlin Affidavit, P. 3.

<sup>11</sup> McLaughlin Affidavit, P. 3.

<sup>12</sup> McLaughlin Affidavit, P. 3.

<sup>13</sup> McLaughlin Affidavit, P. 3.

14.) Pal likewise filed a Motion for Stay of Execution and the Court immediately entered an Order Staying Execution.<sup>14</sup> In fact, KeyBank received the Order Staying Execution before it ever received Pal's motion.

15.) Unlike the Court's January 3, 2011, Judgment, the undersigned is unaware that Pal has posted any bond regarding the November 3, 2011, Judgment for Attorneys' Fees and Costs and no proof of its posting has been provided.<sup>15</sup>

### III. STANDARD OF REVIEW

Motions for Reconsideration are addressed in Rule 11(a) of the IDAHO RULES OF CIVIL PROCEDURE ("IRCP"). It states:

A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order.

IRCP 11(a)(2)(B). "The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Antim v. Fred Meyer Stores, Inc.*, 150 Idaho 774, \_\_\_, 251 P.3d 602, 610 (Ct. App. 2011) (citations omitted). "When considering a motion to reconsider under IRCP 11(a)(2) the district court should take into account any new facts or information presented by the moving party that bear on the correctness of the district court's order. *Couer d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

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<sup>14</sup> McLaughlin Affidavit, P. 4.

<sup>15</sup> McLaughlin Affidavit, P. 4.

#### IV. ANALYSIS

- 1.) KeyBank's Motion to Reconsider should be granted because Pal has not posted a bond for the Judgment for Attorneys' Fees and Costs.

IAR 13(b)(15) is crystal clear. It allows the District Court to stay execution proceedings upon the posting of a cash deposit or bond. In fact, District Courts do not even acquire jurisdiction to stay execution unless and until such security is actually posted. IAR 13(b)(15) states:

In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to ... [s]tay execution or enforcement of a money judgment upon the posting of a cash deposit or supersedeas bond ... in the amount of the judgment or order, plus 36% of such amount.

IAR 13(b)(15) (emphasis added). In accordance with IAR 13(b)'s plain language, this Court only acquires the "power and authority" to stay execution if a cash deposit or supersedeas bond is posted. Until then, the Court not only cannot stay execution as a matter of substance, but lacks the jurisdiction to do so. Compare IAR 13(b)(15) ("In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority") (emphasis added) with *Henry v. Ysursa*, 2008 WL 4330547 (Idaho) at \* 3 (Defining jurisdiction as jurisdiction as the "power or authority conferred by law") (emphasis added).

Here, a cash deposit in the appropriate amount was submitted regarding the January 3, 2011, Judgment. However, no similar bond was posted regarding the Court's November 3, 2011, Judgment for Attorneys' Fees and Costs. Accordingly, while this Court certainly has authority to stay execution efforts regarding the former judgment, it does not have such similar authority regarding the latter judgment unless, and until, a bond in the amount of the judgment,

plus 36% is posted. Therefore, as a matter of law, this Court cannot stay execution of the Judgment for Attorneys' Fees and Costs. Accordingly, Pal's Motion for Stay of Execution should have been denied and Key Bank respectfully requests that this Court revisit its decision to enter the Order Staying Execution.

2.) KeyBank's Motion to Reconsider should be granted because IAR 16(a) has no application to the facts at bar.

Pal relies on IAR 16(a) in support of its position that when a judgment appealed from is for attorneys' fees and costs, no bond must be posted. This position lacks merit. First, the plain language of IAR 16(a) militates against Pal's argument. IAR 16(a) states:

**Rule 16. Bonds on appeal.** (a) No Cost Bond Required. No undertaking on appeal for costs shall be required.

IAR 16(a). Notably, the foregoing excerpt does not state that when a judgment on appeal is for fees and costs, a bond is not required and IAR 13(b)(15) ceases to apply. Rather, IAR 16(a) simply states that a "cost bond" does not have to be posted as a precondition to an appeal. As to the function of a cost bond, this is well stated in American Jurisprudence:

The cost bond differs from the supersedeas bond which must be filed to obtain a stay of the judgment pending appeal. The cost bond may only be used to secure the recovery of the costs of the appeal and not as a means to enforce the underlying judgment being appealed.

5 Am.Jur.2d Appellate Review § 325.

The foregoing interpretation is consistent with our Idaho Supreme Court's treatment of a cost bond under former I.C. § 13-202. *Martinson v. Martinson*, 90 Idaho 490, 493414 P.2d 204, 205 (1966) (The purpose of I.C. § 13-202 was "to afford security to the respondent for all

damages and costs which may be awarded to respondent against the appellant on appeal"). Based on the above text, the drafters of IAR 16(a) did not intend to establish limitations on when a bond had to be posted vis-à-vis the nature of the judgment from which an appeal was being taken. The intent of the drafts appears far simpler, i.e., to simply abolish Idaho's archaic requirement that a cost bond be posted.

Second, the genealogy of IAR 16(a) supports KeyBank's interpretation. As stated, IAR 16(a) replaced I.C. § 13-201, *et seq.*, in 1977 when the foregoing statute was repealed. *Erickson v. Amouth*, 99 Idaho 907, 908, 591 P.2d 1074, 1075 (1979) ("[D]uring the pendency of this appeal I.C. § 13-203 was repealed and I.A.R. 16(a) adopted, which expressly eliminates the requirements of posting a cost bond on appeal"). Under former I.C. § 13-202, a cash bond was actually required in order to perfect an appeal unless this requirement was waived by the respondent. I.C. § 13-202 provided as follows:

The appeal is ineffectual for any purpose unless prior to or at the time of filing the notice of appeal or within five (5) days thereafter, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

I.C. § 13-202; *See also Brookshier v. Hyatt*, 91 Idaho 305, 420 P.2d 788 (1966) ("On January 31, 1966, plaintiffs perfected their appeal from such order including the posting of a \$300.00 cost bond, as required by I.C. § 13-203") (emphasis added).

The fact that IAR 16(a) was drafted for the sole purpose of eliminating Idaho's cost bond requirement is further confirmed by the fact IRCP 83(h) was also repealed in 1977. Just like I.C. § 13-202, IRCP 83(h) required that a cost bond be posted in appeals from magistrate court to



district courts. See IRCP 83(h) (Requiring "a litigant taking appeal to the district court to file a cost bond or undertaking in the district court within ten days after filing his notice of appeal"); See also *Neal v. Harris*, 100 Idaho 348, 350, 597 P.2d 234, 236 (1979).

In short, nothing about I.C. § 13-202, IRCP 83(h) or IAR 16(a) implicates whether a supersedeas bond must be posted on an appeal from a judgment for attorneys' fees and costs. Based on an analysis of IAR 16(a), its predecessor statute, and case law interpreting the same, the purpose of IAR 16(a) was simply to eliminate the requirement of posting a cost bond to perfect an appeal. Therefore, IAR 16(a) has nothing to do with the facts at bar and certainly provides no legal basis to conclude that the drafters intended to eliminate supersedeas bonds when a judgment of attorneys' fees and costs is the subject matter of appeal.

Third, Justice Horton's discussion of cost bonds in footnote one (1) of *Beco Construction Company, Inc. v. J-U-B Engineers Inc.*, 149 Idaho 294, 233 P.3d 1216, (2010) is dicta. Dicta constitutes:

Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand or obiter dicta, and lack the force of an adjudication. *Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and **made without argument**, or full consideration of the point, are not the professed deliberate determinations of the judge himself.

*Smith v. Angell*, 122 Idaho 25, 35 830 P.2d 1163, 1173 (1992) (dissent). In the *Beco* decision, the Court goes so far as to admit that the issue of whether or not a bond is required when the judgment appealed from is for fees and costs was neither argued, nor raised by any of the parties. *Beco*, 149 Idaho at 299, 233 P.3d at 1221, fn. 1 ("Although neither party has addressed

this issue ..."). Accordingly, the passing comment by the Court was "made without argument," was not "essential to determination of the case," and thus has no precedential value. *Shrives v. Talbot*, 91 Idaho 338, 346, 421 P.2d 133, 141 (1966) ("[T]his is pure dicta and cannot be relied upon as binding precedent upon the court").

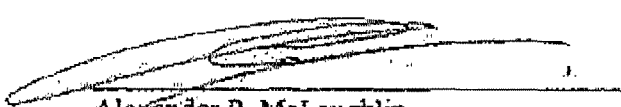
Fourth, even if Justice Horton's comments were authoritative, they do not apply to the facts of this case. The Notice of Appeal filed by Pal was submitted on March 16, 2011. The foregoing notice does not mention that one of the issues on appeal was whether or not the Court erred in awarding fees and costs. In fact, this is a logistical impossibility since the Notice of Appeal was filed on March 16, 2011, and the Judgment for Attorneys' Fees and costs was submitted on November 3, 2011. As such, because the above judgment does not form the subject matter of Pal's appeal, *Beco* does not apply to this case.

#### V. CONCLUSION

KeyBank respectfully requests that this Court GRANT KeyBank's Motion to Reconsider Order Staying Execution and thus, DENY Pal's Motion to Stay Execution.

DATED this 15<sup>th</sup> day of December, 2011.

GIVENS PURSLEY LLP



Alexander P. McLaughlin  
Attorneys for KeyBank

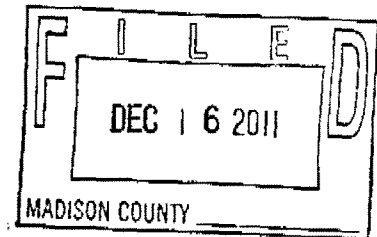
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of December, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES,  
PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

- ☐ Via U.S. Mail
- ☐ Via Hand-Delivery
- ☐ Via Overnight Delivery
- ☒ Via Facsimile 208-529-4166

  
Alexander P. McLaughlin



Thomas E. Dvorak (ID State Bar ID# 5043)  
Alexander P. McLaughlin (ID State Bar ID# 7977)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

AFFIDAVIT OF ALEXANDER P.  
MCLAUGHLIN IN SUPPORT OF  
MOTION TO RECONSIDER ORDER  
STAYING EXECUTION

STATE OF IDAHO     )  
                              )ss  
County of Ada         )

ALEXANDER P. MCLAUGHLIN, being first duly sworn upon oath, deposes and states:

- 1.) I am the attorney of record for KeyBank in the above-captioned matter.
- 2.) Accordingly, I have personal knowledge of the facts contained herein and make this affidavit on the basis of such personal knowledge and belief.
- 3.) On or about January 3, 2011, this Court entered its Judgment against Pal I, LLC ("Pal") in the original amount of \$16,884.41. Pal appealed from this Judgment.
- 4.) KeyBank attempted to satisfy the judgment by levying and executing on Pal's appeal rights.
- 5.) On June 13, 2011, Pal filed its Claim of Exemption, wherein Pal took the position that its appeal rights were not a cause of action on which levy was appropriate and, in fact, were exempt from execution under Idaho law.
- 6.) On August 31, 2011, the Court issued its Memorandum Decision on Post-Judgment Motions. Pal's arguments were squarely rejected. Accordingly, KeyBank reinitiated its levy and execution efforts.
- 7.) In lieu of posting an actual bond, Pal set up a restricted disbursement account in the amount that had to be posted under Rule 13(b)(15) of the IDAHO APPELLATE RULES. Pal also filed a Motion to Stay Execution and KeyBank objected.

8.) On September 16, 2011, this Court again found in favor of KeyBank and issued its Order Denying Motion for Stay of Execution.

9.) Pal eventually posted its bond and filed a Motion for Stay of Execution and Notification of Cash Deposit. In response, KeyBank filed its notice of non-opposition to this particular motion.

10.) To date, the Court has not issued an order on Pal's second Motion for Stay of Execution.

11.) On or about November 3, 2011, this Court issued its Judgment for Attorneys' Fees and Costs in the amount of \$7,004.83.

12.) The Court's November 3, 2011, judgment is independent of the Court's initial January 3, 2011, Judgment. So much is stated in the body of the Judgment for Attorneys' Fees and Costs, wherein it is noted that the latter judgment was entered "in addition to the Judgment previously entered." Judgment for Attorneys' Fees and Costs, P. 2 (emphasis added).

13.) Because a new judgment was issued that was separate from the January 3, 2011, judgment, KeyBank initiated new proceedings to execute on Pal's appeal rights.

14.) In response, Pal filed yet another Claim of Exemption (on the same grounds as the previous claim of exemption, which were denied) and a third Motion for Stay of Execution.


15.) KeyBank followed with its Second Motion Contesting Pal I, LLC's Claim of Exemption and a proposed order allowing KeyBank to proceed with levy and execution on Pal's appeal.

16.) Pal likewise filed a Motion for Stay of Execution and the Court immediately entered an Order Granting Motion for Stay of Execution.

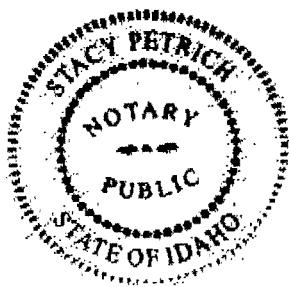
17.) Unlike the Court's January 3, 2011, Judgment, the undersigned is unaware that Pal has posted any bond regarding the November 3, 2011, Judgment for Attorneys' Fees and Costs and no proof thereof has been provided. A bond is required under IAR 13(b)(15) to stay execution.

18.) KeyBank believes that there is no legal basis to stay execution on this newest for Attorneys' Fees and Costs and thus files the accompanying motion to reconsider.

DATED this 15th day of December, 2011.

  
Alexander P. McLaughlin

SUBSCRIBED AND SWORN to before me this 15th day of December, 2011.



  
NOTARY PUBLIC FOR IDAHO

Residing at Boise, Idaho

My commission expires: March 1, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of December, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES,  
PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

- ☐ Via U.S. Mail
- ☐ Via Hand-Delivery
- ☐ Via Overnight Delivery
- ☒ Via Facsimile 208-529-4166

  
\_\_\_\_\_  
Alexander P. McLaughlin



# In the Supreme Court of the State of Idaho

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff-Respondent,

v.

PAL I, III, an Idaho limited liability company,

Defendant-Appellant,

and

BRIAN CHRISTENSEN, an individual; L.A.  
PARKINSON, an individual; BARNEY  
DAIRY, INC.; D.J. BARNEY, an individual;  
WILLIAM DAVIS, an individual; LOIS  
DAVIS, an individual; DELL RAY BARNEY,  
an individual; and DELL J. BARNEY, an  
individual, dba BARNEY TOWING &  
RECOVERY,

Defendants.

ORDER GRANTING MOTION TO  
AUGMENT THE CLERK'S RECORD  
AND FOR SUPPLEMENTAL  
BRIEFING

Supreme Court Docket No. 38645-2011  
Madison County Docket No. 2010-680

A MOTION TO AUGMENT THE CLERK'S RECORD AND FOR SUPPLEMENTAL BRIEFING and a STATEMENT OF COUNSEL were filed by counsel for Appellant on February 27, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT THE CLERK'S RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Judgment for Attorneys' Fees and Costs, file-stamped November 4, 2011;
2. Motion for Stay of Execution, file-stamped December 13, 2011;
3. Order Staying Execution, file-stamped December 14, 2011;
4. Motion to Reconsider Order Staying Execution, file-stamped December 15, 2011;
5. Plaintiff's Second Motion Contesting PAL I, LLC's Claim of Exemption, with attachment, file-stamped December 13, 2011; and

ORDER GRANTING MOTION TO AUGMENT THE CLERK'S RECORD AND FOR  
SUPPLEMENTAL BRIEFING – Docket No. 38645-2011

6. Order Granting Keybank's Motion to Reconsider Order Staying Execution and Second Motion Contesting PAL I, LLC's Claim of Exemption, file-stamped January 4, 2012.

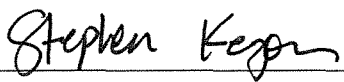
IT FURTHER IS ORDERED that Appellant's MOTION FOR SUPPLEMENTAL BRIEFING to address the issue of whether the district court committed reversible error by ordering PAL to post security to stay execution on the plaintiff's Judgment for Attorneys' Fees and Costs entered on November 4, 2011 be, and hereby is, GRANTED and APPELLANT'S SUPPLEMENTAL BRIEF shall be filed with this Court on or before thirty-five (35) days from the date of this Order.

IT FURTHER IS ORDERED that RESPONDENT'S SUPPLEMENTAL BRIEF shall be filed with this Court on or before twenty-eight (28) days of the date of filing of Appellant's Supplemental Brief.

IT FURTHER IS ORDERED that APPELLANT'S SUPPLEMENTAL REPLY BRIEF shall be filed with this Court on or before twenty-one (21) days of the date of filing of Respondent's Supplemental Brief.

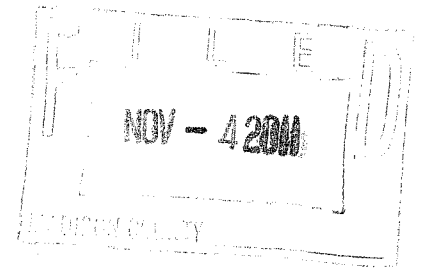
DATED this 29 day of February 2012.

For the Supreme Court

  
Stephen W. Kenyon, Clerk

cc: Counsel of Record

Thomas E. Dvorak (ID State Bar ID# 5043)  
Amber N. Dina (ID State Bar ID# 7708)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
1261720\_3 (10894-2)



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Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV-10-680

**JUDGMENT FOR ATTORNEYS'  
FEES AND COSTS**

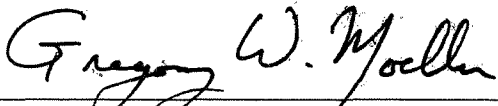
Based on the Memorandum Decision entered on December 22, 2010, and the  
Memorandum Decision on Costs and Attorney Fees entered on October 25, 2011, IT IS  
HEREBY ORDERED ADJUDGED AND DECREED:

1. That Defendant PAL I, LLC is liable to KeyBank National Association  
("KeyBank") for the amounts of \$6,916.83 for attorneys' fees and \$88.00 for costs incurred, for  
a total amount due for costs and attorneys' fees of \$7,004.83, plus interest on said amount from

and after the date of this Judgment for Attorneys' Fees and Costs at the statutory judgment rate of 5.250% per annum.

2. This Judgment for Attorneys' Fees and Costs is entered in addition to the Judgment previously entered in favor of KeyBank and against Defendant PAL I, LLC on January 3, 2011.

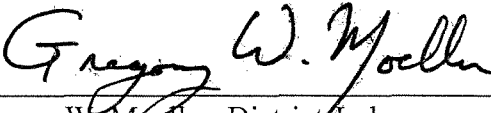
DATED this 3 day of Nov, 2011.

  
\_\_\_\_\_  
Gregory W. Moeller, District Judge

### RULE 54(b) CERTIFICATE

With respect to the issues determined by the above Judgment for Attorneys' Fees and Costs, it is hereby CERTIFIED, in accordance with Rule 54(b) of the Idaho Rules of Civil Procedure, that the Court has determined that there is no just reason for delay of the entry of judgment as to the claims filed against the Defendant Pal I, LLC and that the Court has and does hereby direct the above Judgment for Attorneys' Fees and Costs shall be a final judgment upon which an appeal be taken as provide by the Idaho Appellate Rules.

DATED this 3 day of Nov, 2011.

  
\_\_\_\_\_  
Gregory W. Moeller, District Judge

CLERK'S CERTIFICATE OF MAILING

I hereby certify that on the 4 day of Nov, 2011, I mailed  
(served) a true and correct copy of the within instrument to:

Thomas E. Dvorak  
Amber N. Dina  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Facsimile: 208-388-1300

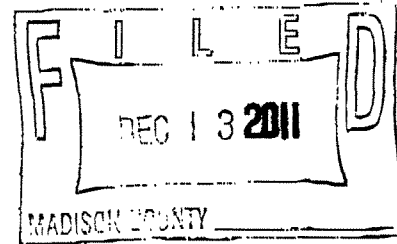
Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES, PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405  
Facsimile: 208-529-4166

CLERK OF THE DISTRICT COURT

By: 

Deputy Clerk

Bryan D. Smith, Esq. – ISBN 4411  
B. J. Driscoll, Esq. – ISBN 7010  
SMITH, DRISCOLL & ASSOCIATES, PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166



Attorneys for Defendant  
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;  
BRIAN CHRISTENSEN, an individual; L.A.  
PARKINSON, an individual; BARNEY DAIRY,  
INC.; D.J. BARNEY, an individual; WILLIAM  
DAVIS, an individual; LOIS DAVIS, an  
individual; DELL RAY BARNEY, an individual;  
and DELL J. BARNEY, an individual, dba  
Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

**MOTION FOR STAY OF EXECUTION**

COMES NOW, the defendant, PAL I, LLC ("PAL"), pursuant to Idaho Appellate Rules 13(b)(8), (13), (15) and (16), Idaho Appellate Rule 16(a), Idaho Rule of Civil Procedure 54(e)(5), and *BECO Const. Co., Inc. v. J-U-B Engineers Inc.*, 149 Idaho 294, 299 n.1 (2010), and moves the court for an order immediately staying execution or enforcement of that certain Judgment for Attorneys' Fees and Costs entered November 4, 2011, against PAL in favor of KeyBank, N.A. ("KeyBank"), in the amount of \$7,004.83.

**MOTION FOR STAY OF EXECUTION – Page 1**

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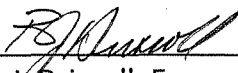
This motion is made on the following grounds and reasons. In *BECO, supra*, the Idaho Supreme Court quoted both Idaho Appellate Rule 16(a) and Idaho Rule of Civil Procedure 54(e)(5) for the conclusion that no undertaking on appeal for costs shall be required to stay execution of a judgment for attorney's fees because attorney's fees are deemed as costs in an action. Thus, PAL is entitled to a stay of execution without the necessity of posting any additional security or undertaking because, as its title represents, KeyBank's Judgment for Attorneys' Fees and Costs is a judgment for attorney's fees and costs for which no undertaking on appeal is required.

PAL respectfully requests that this court immediately enter an order staying enforcement of the judgment and that the court prohibit recordation of the judgment as a lien on any real property, or if previously recorded by KeyBank, to order KeyBank to record a release of said judgment in any and all counties wherein KeyBank has recorded an abstract of said judgment.

This motion is based on this Motion and the court's records and files herein. PAL does not request oral argument. PAL submits a proposed order concurrently herewith.

DATED this 12 day of December, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

  
\_\_\_\_\_  
B. J. Driscoll, Esq.  
Attorneys for Plaintiff



# CERTIFICATE OF SERVICE

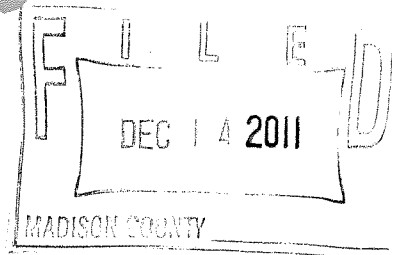
I HEREBY CERTIFY that on this 12 day of December, 2011, I caused a true and correct copy of the foregoing **MOTION FOR STAY OF EXECUTION** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.  
Amber N. Dina, Esq.  
GIVENS PURSLEY, LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Facsimile: 208-388-1300

☒ U. S. Mail  
☐ Fax  
☐ Overnight Delivery  
☐ Hand Delivery

  
B.J. Driscoll

RECEIVED DEC 15 2011



Bryan D. Smith, Esq. – ISBN 4411  
B. J. Driscoll, Esq. – ISBN 7010  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166

Attorneys for Defendant  
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;  
BRIAN CHRISTENSEN, an individual; L.A.  
PARKINSON, an individual; BARNEY DAIRY,  
INC.; D.J. BARNEY, an individual; WILLIAM  
DAVIS, an individual; LOIS DAVIS, an  
individual; DELL RAY BARNEY, an individual;  
and DELL J. BARNEY, an individual, dba  
Barney Towing & Recovery,

Defendants.

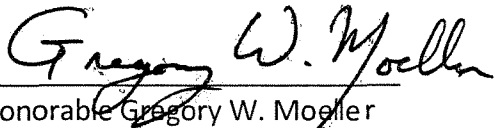
Case No. CV-2010-680

**ORDER STAYING EXECUTION**

The motion of defendant, PAL I, LLC, having come before the court, for stay of execution, and the court being fully informed in the premises, enters the following Order:

1. The court grants PAL I, LLC's motion and immediately stays execution or enforcement of that certain judgment entered November 4, 2011, against PAL in favor of KeyBank, N.A. ("KeyBank"), in the amount of \$7,004.83 ("Judgment").

2. The Judgment shall not be recorded, or shall be immediately released if recordation has occurred.

  
Honorable Gregory W. Moeller  
District Judge

**CERTIFICATE OF SERVICE**

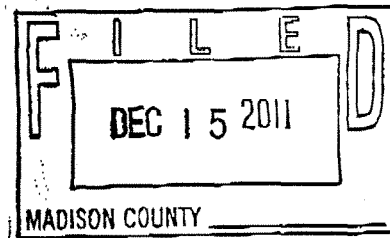
I HEREBY CERTIFY that I mailed a conformed copy of the foregoing ORDER to the parties listed below on this 14 day of December, 2011.

B. J. Driscoll, Esq.  
SMITH, DRISCOLL & ASSOCIATES  
P.O. Box 50731  
Idaho Falls, ID 83405-0731

Thomas E. Dvorak, Esq.  
Amber N. Dina, Esq.  
GIVENS PURSLEY, LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720

BY:

  
Deputy Clerk



Thomas E. Dvorak (ID State Bar ID# 5043)  
Alexander P. McLaughlin (ID State Bar ID# 7977)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

MOTION TO RECONSIDER ORDER  
STAYING EXECUTION

COMES NOW Plaintiff KeyBank National Association ("KeyBank" or "Plaintiff"), by  
and through its counsel of record, Givens Pursley LLP, and hereby moves this Court pursuant to

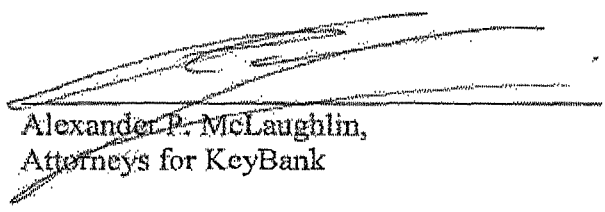
MOTION TO RECONSIDER ORDER STAYING EXECUTION - 1

Rule 11 of the IDAHO RULES OF CIVIL PROCEDURE for entry of its Order Granting Motion to Reconsider Order Staying Execution. This motion is made on the grounds and reasons as are contained in the accompanying Memorandum in Support of Motion to Reconsider which is by this reference incorporated herein as though set forth in full. This motion is based on the records and files herein, the Affidavit of Alexander P. McLaughlin in Support of Motion to Reconsider Order Staying Execution, and the Memorandum in Support of Motion to Reconsider Order Staying Execution.

Oral argument is requested on this motion unless the Court deems that its "decisional process would not be significantly aided by oral argument [and that this motion should] be decided on the record ... without a hearing." *Carter v. Carter*, 2009 WL 3242095 (D.Idaho, 2009) at \*1; *See also Gallegos v. Correctional Medical Services*, 2011 WL 3678926 (D.Idaho, 2011) ("Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court").

DATED this 15<sup>th</sup> day of December, 2011.

GIVENS PURSLEY LLP



Alexander P. McLaughlin,  
Attorneys for KeyBank

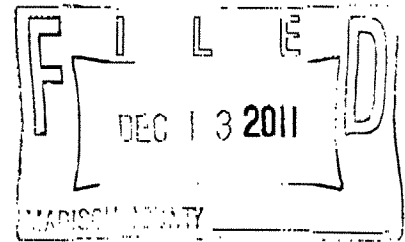
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of December, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES,  
PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

- ☐ Via U.S. Mail
- ☐ Via Hand-Delivery
- ☐ Via Overnight Delivery
- ☒ Via Facsimile 208-529-4166

  
\_\_\_\_\_  
Alexander P. McLaughlin



Thomas E. Dvorak (ID State Bar ID# 5043)  
Alexander P. McLaughlin (ID State Bar ID# 7977)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300  
13431821\_2 [10894-2]

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

PLAINTIFF'S SECOND MOTION  
CONTESTING PAL I, LLC'S CLAIM  
OF EXEMPTION

COMES NOW Plaintiff KeyBank National Association (“KeyBank” or “Plaintiff”), by and through its counsel of record, Givens Pursley LLP, and hereby moves this Court pursuant to I.C. § 11-203 for an order denying the Claim of Exemption filed by Pal I, LLC (“Pal”), on December 12, 2011. This motion is made on the grounds and reasons set forth in KeyBank’s original Motion Contesting Pal I, LLC’s Claim of Exemption as Pal’s most recent Claim of Exemption offers almost no new substantive arguments<sup>1</sup> and Pal’s position was already rejected by this Court in its Memorandum Decision on Post-Judgment Motions.<sup>2</sup> The foregoing motion and accompanying memorandum in support are by this reference incorporated herein as though set forth in full.

Pal raises only two (2) additional substantive points: (a) Pal filed a Motion for Stay of Execution that should be granted; and (b) the subject matter of levy is unclear. These arguments lack merit. First, the previous Motion for Stay of Execution pertained to the original money judgment and a bond therefor was posted. The judgment at issue in this second attempt at levy is the judgment for attorneys’ fees and costs and is independent of the original money judgment. Accordingly, the Motion for Stay of Execution, previously filed, has no bearing on execution under this new judgment. Moreover, no additional bond has been posted and counsel for Pal has again informed counsel for KeyBank that no new bond will be posted. Second, the subject matter of levy is crystal clear. KeyBank is levying on all Pal’s rights and interests in its cause of

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<sup>1</sup> See Affidavit of Alexander P. McLaughlin in Support of Second Motion Contesting Pal I, LLC’s Claim of Exemption, Ex. A and B.

<sup>2</sup> *Id.*, Ex. C.



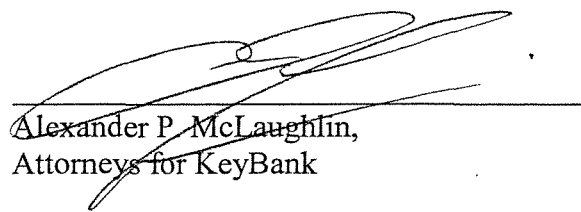
action and appeal in this precise case.

This motion is based on the records, pleadings, and files lodged and/or filed herein and any other such items which may hereafter be lodged and/or filed herein, including the Affidavit of Alexander P. McLaughlin in Support of Plaintiff's Second Motion Contesting Pal I, LLC's Claim of Exemption. A true and correct copy of the Claim of Exemption is attached to the foregoing affidavit and this motion and is hereby lodged with the Court. KeyBank also requests an award of costs incurred in bringing this motion under I.C. § 11-203(b).

Oral argument is requested on this motion unless the Court deems that its "decisional process would not be significantly aided by oral argument [and that this motion should] be decided on the record ... without a hearing." *Carter v. Carter*, 2009 WL 3242095 (D.Idaho, 2009) at \*1; *See also Gallegos v. Correctional Medical Services*, 2011 WL 3678926 (D.Idaho, 2011) ("Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court").

DATED this 15<sup>th</sup> day of December, 2011.

GIVENS PURSLEY LLP



Alexander P. McLaughlin,  
Attorneys for KeyBank

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of December, 2011, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith  
B.J. Driscoll  
SMITH DRISCOLL & ASSOCIATES,  
  PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, ID 83405

- ☒ Via U.S. Mail  
☐ Via Hand-Delivery  
☐ Via Overnight Delivery  
☒ Via Facsimile 208-529-4166

---

Alexander P. McLaughlin

Bryan D. Smith, Esq. — ISBN 4411  
 B. J. Driscoll, Esq. — ISBN 7010  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
 414 Shoup Ave.  
 P.O. Box 50731  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 524-0731  
 Facsimile: (208) 529-4166

Attorneys for Defendant/Appellant  
 PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
 national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;  
 BRIAN CHRISTENSEN, an individual; L.A.  
 PARKINSON, an individual; BARNEY DAIRY,  
 INC.; D.J. BARNEY, an individual; WILLIAM  
 DAVIS, an individual; LOIS DAVIS, an  
 individual; DELL RAY BARNEY, an individual;  
 and DELL J. BARNEY, an individual, dba  
 Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

**CLAIM OF EXEMPTION**

BONEVILLE COUNTY  
 SHERIFF'S DEPT.  
 IDAHO FALLS, IDAHO  
 RECEIVED

11 DEC 12 P4:10

WARRANT # \_\_\_\_\_

CIVIL # \_\_\_\_\_

1. I claim an exemption from levy for the following described money and/or property:

- a) Money, Including money in a bank account, which was paid to me or my family as:
- \_\_\_\_\_ Public assistance of any kind
  - \_\_\_\_\_ Social Security or SSI
  - \_\_\_\_\_ Worker's compensation
  - \_\_\_\_\_ Unemployment benefits
  - \_\_\_\_\_ Child Support
  - \_\_\_\_\_ Retirement, pension, or profit sharing benefits
  - \_\_\_\_\_ Military or veteran's benefits
  - \_\_\_\_\_ Life Insurance or other insurance
  - \_\_\_\_\_ Disability, illness, medical or hospital benefits
  - \_\_\_\_\_ Alimony, support or maintenance
  - \_\_\_\_\_ Annuity contract benefits
  - \_\_\_\_\_ Bodily Injury or wrongful death awards

\_\_\_\_ Other money (describe) \_\_\_\_\_  
 \_\_\_\_ Wages (Do not check this box until you have first talked to your employer to see if he/she correctly calculated your exemption according to the formula under Item 28 on the form entitled "SOME EXEMPTIONS TO WHICH YOU MAY BE ENTITLED." Then check this box only if you believe your employer's calculation is incorrect.

## b) Property,

\_\_\_\_ Professional books  
 \_\_\_\_ Burial plots  
 \_\_\_\_ Health aids  
 \_\_\_\_ Homestead, house, mobile home and related structures  
 \_\_\_\_ Jewelry  
 \_\_\_\_ Car, truck or motorcycle  
 \_\_\_\_ Tools and implements  
 \_\_\_\_ Appliances, furnishings, firearms, animals, musical instruments, books, clothes, family portraits and heirlooms

✓ Other property (describe) Defendant PAL I, LLC ("PAL") objects to the Plaintiff's purported execution by levy and attachment on the grounds that the exact property that the Plaintiff has attempted to levy upon is unclear from its writ and notice. Further, PAL claims that "all debts and credits owing to [it] . . . including but not limited to [its] claim, cause of action and appeal rights associated with this matter" purportedly levied upon by the Bonneville County Sheriff are exempt from levy by execution on the following grounds: (1) PAL's right to appeal the judgment entered in this case in favor of Plaintiff is not subject to execution to satisfy that same judgment from which PAL appeals; (2) Plaintiff's execution has violated Idaho Code Sections 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301; and (3) Plaintiff violated Idaho Rule of Civil Procedure 5. In addition, PAL has filed a motion for stay of execution, which the court should grant under the authority of Idaho Appellate Rules 13(b) and 16, Idaho Rule of Civil Procedure 54(e)(5), and BECO Const. Co., Inc. v. J-U-B Engineers Inc., 149 Idaho 294, 299 n.1 (2010).

B. Driscoll  
 B. Driscoll, Esq.  
 Attorney for Defendant, PAL I, LLC

P.O. Box 50731

Address

Idaho Falls, ID 83405

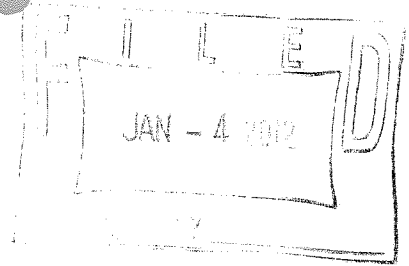
City, State Zip

208-524-0731

Phone Number

Return to: Bonneville Sheriff, 605 N. Capital Ave., Idaho Falls, ID 83402

Thomas E. Dvorak (ID State Bar ID# 5043)  
Alexander P. McLaughlin (ID State Bar ID# 7977)  
GIVENS PURSLEY LLP  
601 West Bannock Street  
Post Office Box 2720  
Boise, Idaho 83701-2720  
Telephone: 208-388-1200  
Facsimile: 208-388-1300



JAN - 5 2012

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability  
company; BRIAN CHRISTENSEN, an  
individual; L.A. PARKINSON, an individual;  
BARNEY DAIRY, INC.; D.J. BARNEY, an  
individual; WILLIAM DAVIS, an individual;  
LOIS DAVIS, an individual; DELL RAY  
BARNEY, an individual; and DELL J.  
BARNEY, an individual, dba Barney Towing  
& Recovery,

Defendants.

Case No. CV 10-680

ORDER GRANTING KEYBANK'S  
MOTION TO RECONSIDER ORDER  
STAYING EXECUTION AND  
SECOND MOTION CONTESTING  
PAL I, LLC'S CLAIM OF  
EXEMPTION

THIS MATTER having come before the Court on Plaintiff KeyBank National Association's ("KeyBank") Motion to Reconsider Order Staying Execution and Second Motion Contesting Pal I, LLC's ("Pal") Claim of Exemption, and the Court having considered the

ORDER GRANTING KEYBANK'S MOTION TO RECONSIDER ORDER STAYING EXECUTION AND  
SECOND MOTION CONTESTING PAL I, LLC'S CLAIM OF EXEMPTION - 1

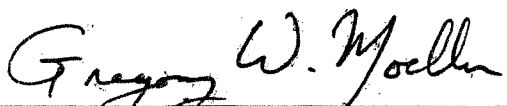
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arguments presented by counsel and having announced its decision in open court, and good cause appearing therefor;

IT IS HEREBY ORDERED that:

- 1.) Plaintiff KeyBank's Motion to Reconsider Order Staying Execution be and is hereby GRANTED; and
  - 2.) The Court's Order Staying Execution, entered on or about December 14, 2011, be and is hereby rescinded;
  - 3.) Defendant Pal's Motion to Stay Execution and Claim of Exemption be and are hereby DENIED;
- 
- 4.) Should Defendant Pal seek to avoid execution of the November 4, 2011, Judgment for Attorneys' Fees and Costs, Defendant Pal must post the appropriate bond in accordance with Rule 13(b)(15) of the IDAHO APPELLATE RULES; and
  - 5.) The property attached pursuant to writ of execution, instructions to the sheriff, and notice of attachment and levy in this case shall be sold by the sheriff in accordance with applicable law, but such sale shall not occur before January 4, 2012, at 5:00, p.m.

DATED this 3 day of Jan 2012, nunc pro tunc \_\_\_\_\_  
December, 2011.

  
\_\_\_\_\_  
The Honorable Gregory W. Moeller  
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of June, 2012, a true and correct copy of the foregoing was served on the following by the manner indicated:

Thomas E. Dvorak

Amber N. Dina

GIVENS PURSLEY LLP

601 W. Bannock

Boise, ID 83702



Via U.S. Mail



Via Hand-Delivery



Via Overnight Delivery



Via Facsimile 208-388-1300

Bryan D. Smith

B.J. Driscoll

SMITH DRISCOLL & ASSOCIATES,  
PLLC



Via U.S. Mail



Via Hand-Delivery



Via Overnight Delivery



Via Facsimile 208-529-4166

414 Shoup Ave.

P.O. Box 50731

Idaho Falls, ID 83405

  
\_\_\_\_\_  
Clerk

# In the Supreme Court of the State of Idaho

---

KEYBANK NATIONAL ASSOCIATION, a  
national banking association,

Plaintiff-Respondent,

v.

PAL I, III, an Idaho limited liability company,

Defendant-Appellant,

and

BRIAN CHRISTENSEN, an individual; L.A.  
PARKINSON, an individual; BARNEY  
DAIRY, INC.; D.J. BARNEY, an individual;  
WILLIAM DAVIS, an individual; LOIS  
DAVIS, an individual; DELL RAY BARNEY,  
an individual; and DELL J. BARNEY, an  
individual, dba BARNEY TOWING &  
RECOVERY,

Defendants.

## ORDER GRANTING MOTION TO AUGMENT THE CLERK'S RECORD

Supreme Court Docket No. 38645-2011  
Madison County Docket No. 2010-680

A MOTION TO AUGMENT THE CLERK'S RECORD and a STATEMENT OF COUNSEL were filed by counsel for Appellant on September 26, 2011. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT THE CLERK'S RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

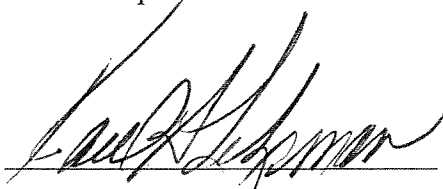
1. Memorandum decision on Post-Judgment Motions, file-stamped August 31, 2011.

ORDER GRANTING MOTION TO AUGMENT THE CLERK'S RECORD – Docket No.  
38645-2011



DATED this 28<sup>th</sup> day of September, 2011.

For the Supreme Court

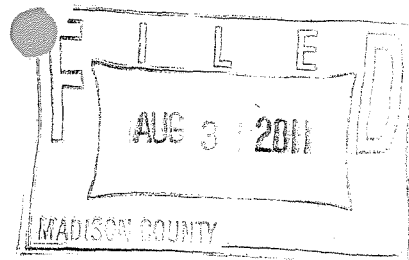
  
for Stephen W. Kenyon, Clerk

cc: Counsel of Record

ORDER GRANTING MOTION TO AUGMENT THE CLERK'S RECORD – Docket No.  
38645-2011

# **EXHIBIT "A"**

RECEIVED SEP - 7 2011



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR MADISON COUNTY

KEYBANK NATIONAL ASSOCIATION, )  
a national banking association, )

Plaintiff, )

v. )

PAL I, LLC, an Idaho limited liability )  
Company; BRIAN CHRISTENSEN, an )  
individual; L.A. PARKINSON, an )  
individual; BARNEY DAIRY, INC.; )  
D.J. BARNEY, an individual; WILLIAM )  
DAVIS, an individual; LOIS DAVIS, an )  
individual; DELL RAY BARNEY, )  
an individual; and DELL J. BARNEY, )  
an individual, dba Barney Towing & )  
Recovery, )

Defendants. )

Case No. CV-10-680

MEMORANDUM DECISION  
ON POST-JUDGMENT MOTIONS

I. PROCEDURAL HISTORY

On December 23, 2010, the Court granted Plaintiff KeyBank National Association's ("KeyBank") motion for summary judgment and denied Defendant PAL I, LLC's ("PAL") cross motion for summary judgment.<sup>1</sup> The Court then entered a judgment in KeyBank's favor for \$16,884.41.<sup>2</sup> After the Court later denied PAL's motion for reconsideration, PAL filed its appeal on March 16, 2011.<sup>3</sup>

PAL advised KeyBank by e-mail on March 23, 2011 that it "would not be posting any surety bond or security to stay execution at this time."<sup>4</sup> Thereafter, on or about May 19,

<sup>1</sup> Memorandum Decision (December 23, 2010).

<sup>2</sup> Judgment (January 3, 2011).

<sup>3</sup> Memorandum Decision on Reconsideration (February 25, 2011) and Notice of Appeal (March 17, 2011).

<sup>4</sup> Affidavit of Alexander P. McLaughlin in Support of Motion Contesting PAL I, LLC's Claim of Exemption, Exhibit "B" (June 20, 2011).

2011, KeyBank delivered a writ of execution to the Bonneville County Sheriff, which directed him to:

[S]atisfy [the] judgment . . . out of the personal property of [PAL], including but not limited to equipment, inventory, accounts receivable, chattel paper, instruments, negotiable documents of title, general intangibles, and any other property . . .<sup>5</sup>

The letter of instructions specifically directed the sheriff to attach and levy upon the following property:

[A]ll goods, chattels, moneys and other property, both real and personal, . . . **the debts and credits and other personal property not capable of manual delivery, specifically including but not limited to Defendant PAL I, LLC's claim, cause of action, and appeal rights associated with the matter, Madison County District Court Case No. CV-2010-680, Idaho Supreme Court/Court of Appeals Docket No. 38645, . . .**<sup>6</sup>

KeyBank served the writ of attachment on PAL's registered agent on June 2, 2011.

Rather than posting a surety bond pursuant to I.A.R. 13(b)(15), PAL opted to file a claim of exemption pursuant to I.C. § 11-203. PAL's claim of exemption asserts numerous deficiencies in the attempted execution. These defects are summarized as follows:

1. The precise property KeyBank has attempted to levy upon is unclear.
2. The property purported to be levied upon is exempt because:
  - A. PAL's right to appeal is not a chose in action subject to execution;
  - B. KeyBank's attempted execution violated I.C. §§ 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301; and
  - C. KeyBank's attempted execution violated Rule 5, I.R.C.P.<sup>7</sup>

There are now two motions pending before the Court: (1) KeyBank's *Motion Contesting PAL I, LLC's Claim of Exemption*, filed June 20, 2011, and (2) PAL's *Motion to Set Aside Judgment, Motion to Consolidate, and Motion to Discharge Attachment*, filed June 24, 2011. By stipulation of counsel, the parties scheduled these matters for a hearing in Jefferson County on July 18, 2011. Following oral argument the Court took these matters under advisement.

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<sup>5</sup> *Id.*, Exhibit "D."

<sup>6</sup> *Id.*, Exhibit "C" (emphasis in original).

<sup>7</sup> *Id.*, Exhibit "A."

## II. DISCUSSION

### A. PAL's Claim of Exemption is Denied because the Right to Appeal the Judgment Rendered in this Matter is a "Thing in Action."

Both parties concede that Idaho Code § 11-301 permits a sheriff to execute upon "things in action." In *Karle v. Visser*, 141 Idaho 804, 807, 118 P.3d 136, 139 (2005), the Idaho Supreme Court cited with approval a decision from the U.S. Bankruptcy Court for the District of Idaho equating a pending lawsuit with a "thing in action." See also *In re Wiersman*, 283 B.R. 294, 300 (D.Id.2002); and *Muir v. City of Pocatello*, 36 Idaho 532, 212 P. 345 (1922). However, PAL argues that because the right to appeal is different from a lawsuit, it should be exempt from execution. The resolution of this issue depends on whether the right to appeal constitutes a "thing in action" under I.C. § 11-301. There are no recorded decisions of the Idaho appellate courts addressing this precise issue.

KeyBank relies heavily upon the recent unpublished ruling of the Idaho Supreme Court in *Smith v. Corlett*, S.Ct. Docket No. 37060-2009. In *Smith*, the prevailing defendant, Rosera, was awarded a \$36,392.04 judgment against Smith for attorney fees and costs by the District Court. When Smith refused to pay, Rosera attempted to execute upon Smith's underlying cause of action against Rosera. Smith objected and the District Court stayed execution. Rosera appealed and filed an application to vacate the stay with the Supreme Court. The Supreme Court vacated the stay and allowed Rosera to satisfy her judgment by levying on Smith's underlying cause of action and the right to appeal the award of costs and attorney fees. Once Rosera purchased these rights at the sheriff's sale, the Supreme Court granted her motion to dismiss the appeal.<sup>8</sup> KeyBank concedes that because this is an unreported decision, it is not binding on the Court. However, it provides significant insight into how the Idaho Supreme Court views such matters.

KeyBank also cites several cases from other jurisdictions which treat the right to sue as a "thing in action." However, only *RMA Ventures California v. Sun America Life Ins. Co.*, 576 F.3d 1070 (10<sup>th</sup> Cir. 2009), deals specifically with the right to appeal. In *RMA*, the Tenth Circuit Court of Appeals confronted a similar issue under Utah law and unanimously upheld a defendant's purchase of a plaintiff's lawsuit *and appeal rights* at a public execution sale. Like in *Smith*, the Tenth Circuit permitted the defendant to dismiss the appeal. It should be

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<sup>8</sup> *Id.*, Exhibits "E" and "F."

noted that Utah's levy and execution rules, set forth in Utah R.Civ.P. 65(f), allow execution against "choses in action," which is almost identical to Idaho's language allowing execution against "things in action" in I.C. § 11-310.<sup>9</sup>

PAL responds by noting that neither *RMV* nor *Smith* involved the levy and sale of the appeal rights of a defendant against whom a judgment had been entered based on the plaintiff's underlying complaint. In *RMV*, the defendant obtained a judgment for attorney fees. The plaintiff did not appeal the attorney fees award, but did appeal the granting of summary judgment to the defendant. The Tenth Circuit permitted defendant to execute upon the right to appeal the adverse summary judgment ruling—not the attorney fees award. In other words, it was the plaintiff's underlying lawsuit or chose in action against the defendant that was subject to execution. Similarly, PAL argues that *Smith* only concerned an execution by Rosera against Smith's original complaint, not the later award of attorney fees. PAL also argues that by definition, a chose in action cannot include a defendant's right to appeal an adverse judgment in the underlying case. Citing BLACK'S LAW DICTIONARY (6<sup>th</sup> ed. 1990), PAL notes that a chose in action is a right to prosecute a lawsuit or legal claim, not the right to defend against a lawsuit or claim. PAL argues persuasively that the right to defend is very different from a counterclaim.

The Court generally agrees with PAL's analysis, but concludes that it is inapplicable to the facts of this case. For example, if an attorney sues an impoverished client on an overdue account, and the trial court erroneously grants the attorney a judgment, could the attorney prevent a reversal on appeal by levying against the client's right to appeal the judgment? Such an outcome would raise serious public policy concerns.<sup>10</sup> However, the Court notes that the facts in this matter are clearly distinguishable from such a scenario.

In the case at hand, the underlying lawsuit concerned KeyBank's complaint for a declaratory judgment quieting title to personal property originally possessed by its judgment debtor, Tri-steel. KeyBank had perfected a secured interest in the property. PAL came into possession of the disputed property by virtue of a later judgment against Tri-steel and sold

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<sup>9</sup> KeyBank also cites *Citizens Nat. Bank v. Dixieland Forest Products, LLC*, 935 So.2d 1004 (Miss., 2006), and *Arbie Mineral Feed Co., Inc. v. Farm Bureau Mut. Ins. Co.*, 462 N.W.2d 677 (Iowa 1990). Although both cases support the position the choses in action are subject to execution when permitted by statute, neither decision appears to directly address the question of whether an appeal is a chose in action.

<sup>10</sup> While this hypothetical might illustrate an appropriate exception to the general rule that an appeal is a thing in action, that issue is not currently before the Court.

the property at a sheriff's sale. KeyBank sought recovery of the sale proceeds retained by PAL, claiming that PAL wrongfully levied against and sold the property in violation of its perfected secured interest.<sup>11</sup> The Court granted summary judgment in KeyBank's favor and awarded them a judgment against PAL for \$16,884.41. After learning that PAL did not intend to post an appeal bond, KeyBank attempted to satisfy their judgment by executing against PAL's appeal rights and "the personal property of [PAL], including but not limited to *equipment, . . . chattel paper, instruments, negotiable documents of title, general intangibles, and any other property . . .*"<sup>12</sup> In other words, the execution attempted by KeyBank was not only against PAL's right to pursue its appeal, but it was also executing against PAL's underlying claim of ownership to the disputed collateral. It is worth remembering that the sheriff was directed to collect a variety of items for sale:

[A]ll goods, chattels, moneys and other property, both real and personal, . . . the debts and credits and other personal property not capable of manual delivery, specifically *including but not limited to* Defendant PAL I, LLC's *claim, cause of action, and appeal rights* associated with the matter, Madison County District Court Case No. CV-2010-680, Idaho Supreme Court/Court of Appeals Docket No. 38645, . . .<sup>13</sup>

The attempted execution included not only PAL's appeal rights, but it also encompassed PAL's "claim" to the moneys, instruments, documents of title, and things in actions associated with the disputed proceeds.

If KeyBank had merely obtained a money judgment on an open account for services rendered, perhaps PAL's argument would be more persuasive. However, this is clearly not a collection case. Here, KeyBank is also seeking to directly levy upon the disputed proceeds now in PAL's possession. PAL's right to appeal the judgment is inextricably connected to its attempt to retain control and possession of the disputed proceeds. In other words, but for its appeal, PAL would have no colorable claim to retaining the proceeds from its improper sale of KeyBank's collateral. KeyBank is merely attempting to levy on PAL's underlying claim that it is the proper owner of property claimed by, and awarded to, KeyBank. If the Sheriff appropriately carried out the execution, KeyBank would not only hold PAL's appeal rights, it would also hold the underlying right, title, and claim to the disputed proceeds.

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<sup>11</sup> See *Complaint for Quiet Title of Alternatively for Creditor's Bill*, Exhibit "B" (August 16, 2010).

<sup>12</sup> *Aff. of McLaughlin*, Exhibit "D" (emphasis added).

<sup>13</sup> *Id.*, Exhibit "C" (emphasis modified from the original).

For these reasons, the Court concludes that PAL's right to appeal the judgment in this case, along with its right to assert ownership in the proceeds of the disputed collateral, are things in actions within the meaning of I.C. § 11-310. The Court notes that this ruling does not leave PAL without legal remedies. PAL may still post a bond or, in the alternative, bid on the personal property at the sheriff's sale in order to preserve its right to seek validation of its legal theories.

**B. The Motion to Discharge the Attachment is Denied.**

PAL also generally attacks KeyBank's attempted levy by asserting that the writ of execution was "improperly or irregularly issued" and should, therefore, be discharged. See I.C. § 8-534. It specifically alleges that KeyBank failed to serve a copy of the application for a writ of execution, or the writ itself, upon PAL pursuant to I.R.C.P. 5. PAL also claims that it did not receive a notice of exemption form, instructions for debtors asserting a claim of exemption, or the form for claiming exemptions. PAL's attorney asserts that the Bonneville County Sheriff failed to serve these documents on the agent.<sup>14</sup> It alleges that these irregularities violate I.C. §§ 8-507(a) and (c), 8-507A, 8-507C, 8-507D, 8-527, 8-534, 11-203, and 11-301.

KeyBank notes, without conceding any irregularity, that PAL essentially waived any objections by timely filing a claim of exemption in this matter. KeyBank also submitted the Affidavit of Keith Christensen, Deputy Sheriff for Bonneville County, in which he testifies that he served a claim of exemption form on PAL's registered agent, but did not send a copy to its attorney because nothing was actually seized.<sup>15</sup>

Although a showing of prejudice is not expressly required under I.C. § 8-534, the Court notes that whatever perceived irregularities are alleged, there appears to be no demonstrated prejudice to PAL. PAL filed a timely claim of exemption and all collection efforts were effectively stayed. No property has been sold and PAL has been afforded a full opportunity to have its objections heard. Any deficiency in PAL's claim of exemption is solely attributable to its failure to assert a legally viable basis for an exemption (see Section II(A), *supra*), not the time within which it was filed.

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<sup>14</sup> Affidavit of B.J. Driscoll, ¶¶ 2-3 (June 24, 2011).

<sup>15</sup> Affidavit of Keith Christensen, ¶¶ 2, 4-6 (July 12, 2011).



Based on the record before it, the Court finds insufficient evidence to contradict Deputy Christensen's affidavit.<sup>16</sup> It appears that the documents served on the agent substantially complied with I.C. § 8-507C. Additionally, PAL's reading of I.C. § 8-534 is inconsistent with the Supreme Court's holding in *McCluskey v. Galland*, 95 Idaho 472, 511 P.2d 289 (1973) ("It is the general rule that any objection to the irregularities of an attachment proceeding must be made before the entry of judgment"). Finally, the Court concludes that there is no merit to PAL's objections based on I.R.C.P 5. This rule only applies to specific "pleadings," which does not include the execution documents and forms involved here. Therefore, the Court finds no irregularity sufficient to invalidate the attempted execution and concludes that PAL's objections to the manner and form of service should be denied.

**C. PAL's Motion to Set Aside Judgment is Denied.**

PAL urges the Court to set aside its earlier decisions pursuant to Rule 60(b)(2), (5), and (6). This rule provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment.

PAL contends that the filing of a new lawsuit against them by Zions First National Bank (Madison County Case No. CV-2011-367) constitutes newly discovered evidence under Rule 60(b)(2). Additionally, they claim this new case makes prospective application of the Court's judgment inequitable under Rule 60(b)(5) because the new action concerns a

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<sup>16</sup> Curiously, there is no affidavit from the registered agent confirming PAL's alleged failure to properly serve him. The *Aff. of Driscoll* only contains a brief assertion, based on hearsay, that the registered agent told him he was not fully served.

competing claim to the proceeds from the same property. In order to rule upon this motion and the motion to consolidate, the Court takes judicial notice of the contents of the file in Madison County Case No. CV-2011-367 pursuant to I.R.E. 201.

Zions Bank's secured interest in the disputed property was a matter of public record and clearly known to PAL prior to the entry of judgment. The new lawsuit should not have surprised PAL and its potential impact on this case was clearly foreseeable. This evidence does not qualify as "information in existence at the time of trial but not discoverable with due diligence." *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 245, 869 P.2d 554, 562 (1993). To the extent that PAL is arguing that the lawsuit itself is new, even if the claimed security interest was known, it is undisputed that the new lawsuit was filed on May 18, 2011, well after this Court had already entered judgment. Facts that occur after a trial do not constitute "newly discovered evidence." *In re Jane Doe, I*, 145 Idaho 650, 652, 182 P.3d 707, 709 (2008). While there was no trial in this case, a judgment had been rendered.

PAL's concern that the Zions Bank's case creates an unacceptable risk of an inequitable result is also misplaced. Rule 60(b)(5) requires PAL to prove that the Court's prior rulings were prospective and no longer equitable. Here, the Court awarded a money judgment to KeyBank. PAL has presented no authority that such a judgment is "prospective." Even if it was prospective, PAL must still prove that the outcome would be "inequitable." The Court notes that PAL could have attempted to join Zions Bank in this case earlier, but declined to do so. As will be discussed more fully below, it is now too late to do so. However, there is nothing stopping PAL from joining KeyBank to the new case in order to avoid the risk of double liability. The Court is confident in the attorneys' ability to assist it in avoiding an inequitable outcome in the new case.

PAL also seeks relief under Rule 60(b)(6), claiming there are "other reason[s] justifying relief from the operation of the judgment." The Court notes that PAL essentially is inviting it to reconsider its prior rulings one more time. It is now argues, in essence, that the filing of the new Zions Bank case somehow exposes the "reversible error" in the Court's reasoning.<sup>17</sup> However, assuming there is a high degree of similarity in the two cases, as suggested by PAL in their briefing, there is no reason to believe the Court's key rulings

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<sup>17</sup> *Brief in Support of PAL's Motions and in Opposition to KeyBank's Motion Contesting PAL I, LLC's Claim of Exemption*, p. 4 (June 24, 2011).

would have been any different had Zions Bank been joined to this case. If Zions Bank's claims are truly identical to KeyBank's, perhaps the only difference would have been the necessity of adjudicating the relative priorities of Key Bank and Zions Bank to the proceeds. As noted by the Idaho Supreme Court, Rule 60(b) motions should not be used as a substitute for an appeal. *Johnston v. Pascoe*, 100 Idaho 414, 420, 599 P.2d 985, 991 (1979). Therefore, the Court respectfully declines to revisit its prior rulings or set aside its judgment.

**D. PAL's Motion to Consolidate is Denied.**

PAL also argues that because the new Zions Bank lawsuit shares common questions of law and fact with the present case, the cases should be consolidated pursuant to Rule 42(a). Idaho Rule of Civil Procedure 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it *may* order a joint hearing or trial of any or all the matters in issue in the actions; it *may* order all the actions consolidated; and it *may* make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(Emphasis added). Of course, the use of "may" throughout Rule 42(a) indicates that this is a discretionary matter for the Court. *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 365 P.2d 958 (1961).

This case has already been adjudicated to a final judgment, which PAL has appealed. Idaho Appellate Rule 13 permits a district court to rule upon certain motions while an appeal is pending. The lengthy list provided Rule 13 does not include a motion to consolidate. There are sound reasons for this exclusion. If a district court were to grant such a motion, it would effectively expand the scope of an appeal already before the Supreme Court. Such a decision is beyond the discretion of this court, and belongs to the tribunal before which the appeal is pending.

Even if the Court had the authority to consolidate the cases at this late stage of the proceedings, it would decline to do so. Frankly, this type of last minute brinkmanship is not conducive to the just and timely resolution of cases. The Court sees no reason why it cannot reach a fair and consistent result in the second case that avoids double liability against PAL. Again, this is a concern PAL could have addressed earlier by joining Zions Bank in this case, but it made the tactical choice not to do so. While the Court may understand PAL's reasons,

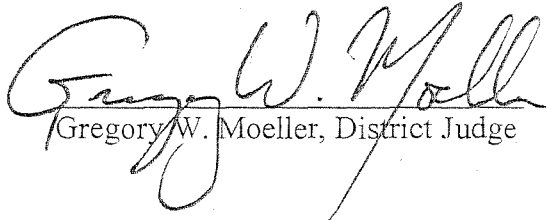
all tactical choices have consequences. If PAL believes it is unjust to proceed on the Zions Bank case while its appeal in this case is pending, there are procedural options available to ensure a consistent result.

### III. CONCLUSION

The Court has once again been asked by the parties to rule upon esoteric questions of collection law with a scarcity of controlling legal precedent. Nevertheless, the Court has attempted to rule upon these questions through consideration of relevant appellate court decisions, reliance upon analogous legal principles and holdings, and the application of common sense. Based upon the analysis set forth herein, the Court hereby rules as follows:

1. KeyBank's *Motion Contesting PAL I, LLC's Claim of Exemption* is GRANTED.
2. PAL's *Motion to Set Aside Judgment, Motion to Consolidate, and Motion to Discharge Attachment* are all DENIED.
3. KeyBank is hereby authorized to proceed with levy and sale on its judgment as provided by law.

SO ORDERED this 31<sup>st</sup> day of August, 2011.

  
Gregory W. Moeller, District Judge

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum Decision on Reconsideration was, on this 31<sup>st</sup> day of August, 2011, served upon the following individuals via U.S. Mail, postage prepaid:

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